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REPORTS
OF
CASES IN CHANCERY,

ARGUED AND DETERMINED

IN
THE ROLLS COURT

DURING THE TIME OF

THE RIGHT HONORABLE
SIR JOHN ROMILLY, KNIGHT,
MASTER OF THE ROLLS.

BY
CHARLES BEAVAN, ESQ., M.A.,
BARRISTER AT LAW.

VOL. XX.
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SIR JOHN ROMILLY, *Master of the Rolls.*

SIR JAMES LEWIS KNIGHT BRUCE, }
SIR GEORGE JAMES TURNER, } *Lords Justices.*

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SIR JOHN STUART, } *Vice-Chancellors.*
SIR WILLIAM PAGE WOOD, }

SIR ALEXANDER J. E. COCKBURN, *Attorney-General.*

SIR RICHARD BETHELL, *Solicitor-General.*

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE ROLLS COURT.

DEAN *v.* ALLEN.

1855.

Feb. 17.

IN this case, an order had been made for the administration of the estate of the testator, *William Beer*, and an inquiry had been directed, whether his executors or his estate were under any liability in respect of leasehold covenants, and whether the executors were entitled to any indemnity in respect thereof.

Where an estate is administered and the residue is paid over under an order of the Court, the executor will be protected, and a creditor will not afterwards be allowed to sue him at law.

It appeared that, in 1798, a house and premises had been demised to the testator for ninety-three years, at a rent of seven guineas and a half, and by the lease the testator covenanted to pay the rent and taxes, and to repair and keep in repair. This property was let for 63*l.* In 1802, twenty-three acres of land, on which

The executors of a lessee held entitled to no further indemnity against the covenants

were

than the personal indemnity of the residuary legatees.

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ALLEN.

were now erected a large manufactory and other buildings, and twenty-nine cottages, were demised to the testator for eighty years, at a rent of 167*l*. The testator had entered into similar covenants in respect of this property, the rental of which was stated to be about 1,000*l*. a year. The testator was in possession of another small leasehold as mortgagee, but no great stress was laid on this. The property had been sold by the executors, and the purchasers had entered into the usual indemnity covenants.

The executors required a sum of 3,000*l*., to be retained to answer the liabilities, if any, which might arise under the testator's covenants, but the Chief Clerk certified, that the executors were not entitled to any indemnity. A summons was taken out to show cause why the certificate should not be varied in respect to the indemnity, and it now came before the Court for argument.

Mr. *Hallett*, for the executors. The testator was the original lessee, and it will therefore be impossible for the executors to release themselves, or the testator's estate from the liability under the covenants. This will therefore continue until the expiration of the leases, and down to that time, the testator's estate and the executors to the extent of the assets, will be liable for any breaches of covenant which may be committed. Towards the expiration of the lease, the property will necessarily become dilapidated, and the executors may then be sued on the covenants. The right of the executors to be indemnified is clearly settled by a long series of cases, as *Simmons v. Bolland* (a); *Hawkins v. Day* (b); *Vernon v. The Earl of Egmont* (c);
Cochrane

(a) 3 *Mer.* 547.
(b) *Ambler*, 160.

(c) 1 *Bli.* (N. S.) 554.

Cochrane v. Robinson (a); *Fletcher v. Stevenson* (b);
Dobson v. Carpenter (c); *Hickling v. Boyer* (d).

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v.
ALLEN.

The decree of the Court would not protect the executors; they would be liable at law under the covenants, and it seems, that in equity, the lessors would not be deprived of their legal remedy. In *Simmons v. Bolland* (e), Sir William Grant expressly states this:—“No decree that I can make will bind the corporation of *Canterbury*” (the lessors), “or protect the executors against their demand.” [*The Master of the Rolls*. I think the contrary has been held. Lord *Cottenham*, in *Knatchbull v. Fearnhead* (f), said, “that where an executor passes his accounts in this Court, he is discharged from further liability, and the creditor is left to his remedy against the legatees; but, if he pays away the residue without passing his accounts in Court, he does it at his own risk.” I apprehend that where the estate is administered by this Court, the executor is perfectly safe, and that the Court would not allow a creditor to sue the executor at law after he had paid over the residue under an order of this Court.]

This is not the case of a debt which could be proved under the decree, but there is a mere contingent liability, which it is the duty of the executors to provide for. He also cited *Norman v. Baldry* (g); *Atkinson v. Grey* (h); *Wright v. Adams* (i); *Shadbolt v. Woodfall* (k).

Mr. *Roupell* and Mr. *W. D. Lewis*, for the Plaintiff, were not heard.

The

(a) 11 *Sim.* 378.

(b) 3 *Hare*, 360.

(c) 12 *Beav.* 370.

(d) 3 *Mac. & G.* 635.

(e) 3 *Mer.* 554.

(f) 3 *Myl. & Cr.* 126.

(g) 6 *Sim.* 621.

(h) 1 *Smale & Giffard*, 577.

(i) Vice-Chancellor *Kindersley*,
January, 12, 1855.

(k) 2 *Collyer*, 30.

1855.

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v.
ALLEN.

The MASTER of the ROLLS.

This Court will, no doubt, direct an indemnity to be given to executors, against the testator's unsatisfied covenants, but, I think, that in this case they run no risk. Where an executor, giving the Court all the information he possesses, acts under the order of this Court, he will be protected from liability under all circumstances. This is stated by Sir *James Wigram*, in *Fletcher v. Stevenson* (a), and I cannot think that Sir *William Grant*, in *Simmons v. Bolland* (b) really intended to question that proposition. It was the duty, no doubt, of these executors to bring forward the matter, and, for their own safety, to see that in the administration of the estate the rights of contingent creditors were protected ; for though there was no liability at the testator's death, yet the obligations under the covenants might afterwards become debts, and it was therefore proper to secure these contingent creditors.

In directing an indemnity to be given to executors, the Court looks at the reasonable probability of there being any future demands against the estate, and in a large number of cases, it has considered the personal security of the persons who receive the estate, and their undertaking to refund, in case any proceedings should be adopted against the executors, to be sufficient. In this case, the executors have not only the indemnity of the purchasers, but an additional circumstance, which affords a very strong security, namely, that the property itself is held on very small ground rents, compared with the rack rent. In such cases, landlords do not enforce the covenants, but prefer, as more beneficial to themselves, forfeiting the lease. This
Court

(a) 3 *Hare*, 370.(b) 3 *Mer.* 554.

Court is well aware that such is the ordinary way in which landlords enforce the due performance of the covenants of a lease, and that they bring an action of ejectment, which is not abandoned until the property is placed in a proper state of repair. In this case, one property, held at a ground rent of 7*l.* 17*s.* 6*d.*, is let at a rent of 60 guineas a year; another property, held at 167*l.* *per annum*, is let for 1,000*l.* This circumstance, coupled with the indemnity of the purchasers, appears to me to be such a sufficient protection, both for the payment of anything which may be claimed, and against any proceedings which may be adopted against the executors or their representatives, as to induce me to say, that a personal indemnity of the residuary legatees is, in this case, sufficient.

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It would be a proceeding harsh in the extreme, where it is more than problematical whether any claim will ever be made, to tie up a sum of 3,000*l.* in Court until 1882, and 1891, and during that time, deprive these legatees of all enjoyment of it. Though I think it very proper for the executors to have brought the point before the Court, I do not consider it necessary to give any further indemnity than the personal indemnity of those persons to whom the money will be paid.

NOTE.—It appears from the argument in *Simmons v. Bolland*, 3 *Mer.* 550, that that suit was not for the general administration of the estate, and this circumstance might therefore justify the observations of Sir *William Grant* (p. 554), that the decree would not protect the executors; but the expression which follows, “if the bond should hereafter be forfeited,” is clearly erroneous.—*C. B.*

1855.

Jan. 19.

GREEN v. DUNN.

Feb. 14.

A testatrix devised an estate, *E.*, to *A. B.* absolutely, and "all her freeholds, &c. not hereinbefore devised" to *A. B.* for life, with remainders over. *A. B.* died in the testatrix's life. Held, that the estate, *E.*, passed under the residuary devise.

MARY COLLING, by her will, bearing date the 28th April, 1847, made separate dispositions by devise of four different portions of her real estate. The first portion, called the *Aislaby* Estate, subject to certain small annuities charged thereon, she devised to *Thomas Colpitts Grainger* for life, with remainder to his first and other sons, in tail male, with remainder to his daughters and their mother, as joint tenants, for life, with a contingent remainder to the survivor in fee. If *Thomas Colpitts Grainger* left no son, or daughter, or widow, then she devised the estate to *John Colpitts Dean*, for life, with remainder to his first and other sons, in tail male, with remainder to his daughters, as tenants in common, in tail, with cross remainders between them, and with an ultimate remainder to the right heirs of the testatrix.

The second portion of her real estate, called the *Blackwell* Estate, the testatrix devised to *John Colpitts Dean*, for life, with remainder to his first and other sons, in tail male, with cross remainders between them, with remainder to the daughters of *John Colpitts Dean*, as tenants in common, in tail, with cross remainders between them, and in default of such issue, upon such trusts as "are hereinafter expressed or declared concerning my residuary freehold and copyhold estate respectively." The will then contained a proviso, that if *John Colpitts Dean*, or any of his male issue, should come into possession of the *Aislaby* Estate by reason of the failure of the previous limitations, then the *Blackwell*

well Estate should be held upon trusts therein described, viz. upon the same trusts "as are hereinafter expressed and declared concerning my residuary freehold and copyhold estate."

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The testatrix then devised the third portion of her estates, being her property at *Escomb*, *Headlam* and *Cockfield*, in the county of *Durham*, to her sister *Margaret Colpitts* in fee.

The fourth remaining portion of her real estates the testatrix devised in these words :—" I hereby give and devise all my freehold, copyhold and leasehold messuages, lands, tenements and hereditaments, *not hereinbefore devised*," unto trustees, their heirs, &c., upon trust that they "shall, from time to time, pay the rents, issues and profits of the same unto my said sister *Margaret Colpitts*, during her life, and after her decease, upon trust to pay the said rents, issues and profits unto my nieces, viz. *Eliza Ann Grainger*, *Ellen Green*, *Jane Benning*, *Charlotte Bourne* and *Mary Jane Cope-land*, and the survivors of them, in equal shares, during their lives; and when it shall happen that there shall be but one of my said nieces surviving, then my said trustees or trustee for the time being shall stand seised and possessed of the said freehold, copyhold and leasehold estates, last hereinbefore devised, in trust for such surviving niece, her heirs, executors, administrators and assigns, according to the nature and quality of the same estates respectively."

The will then directed the rents and profits to be applied for the maintenance, &c., of the persons for the time being beneficially interested, during their minorities; and the testatrix gave all her personal estate to her trustees, upon trust, to convert and invest in
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government or real securities, and stand possessed thereof on like trusts, in favour of *Margaret Colpitts* and the five nieces.

Margaret Colpitts, the sister of the testatrix, died on the 15th of *August*, 1849. On the 8th of *December* following, the testatrix made a codicil to her will, by which she substituted another gentleman as trustee in the place of one of those named in her original will, and she revoked and altered some portion of the dispositions of her will relative to the *Aislaby* and *Blackwell* Estates; but she left the devise of the *Escomb*, *Headlam* and *Cockfield* Estates to her sister untouched, although she was then dead; and she left, also, the residuary devise untouched. The testatrix made four other codicils to her will, but by none of them did she vary the devises of the two last portions of her property. By the fifth she gave the residue of her personal estate, after payment of debts, &c., to her five nieces for life, with remainder to their children respectively.

The testatrix herself died in *April*, 1850, leaving her five nieces all surviving.

Margaret Colpitts having died in the lifetime of the testatrix, the devise to her of the *Escomb*, *Headlam* and *Cockfield* Estates lapsed, and the question was, whether those estates fell into the residue and passed by the residuary devise, or whether they devolved upon the heir at law of the testatrix; this turned principally upon the effect of the 25th section of the Wills Act (1 *Vict.* c. 26), which enacts, that unless a contrary intention shall appear by the will, such real estate, as shall be comprised in any devise which shall fail, shall be included in the residuary devise.

On

On behalf of the heir, it was said, that a contrary intention did appear in this case, and that consequently the old rule of law prevailed, under which the devise lapsed, and the estate descended to the heir at law. First, because the testatrix had interpreted and expressed her meaning by saying, in effect :—I devise my estates at A. B. and C. to one, and “All my freehold, copyhold and leasehold messuages, lands, tenements and hereditaments *not hereinbefore devised*,” to other persons; which latter was a specific devise of those lands only which did not answer the prior local description. Secondly, because the testatrix could not possibly have meant, by the residuary devise, to give to her sister, *Margaret Colpitts*, a life estate in property, which she had previously, by the same will, devised to her in fee.

On the other hand, it was argued, on behalf of the residuary devisees, that this was a common residuary devise and comprehended every estate not otherwise validly and effectually disposed of, and included lapsed devises; and as to the alleged local description, the phrase “*hereinbefore devised*,” could only mean a previous devise which took effect. That the 25th section of the Wills Act was express,—that all devises which failed shall be included in the residuary devise. Secondly, that there was no inconsistency, for the residuary devise could only operate on the *Escomb* estate in the event of *Margaret Colpitts* predeceasing the testatrix, and of her taking nothing in it, although the devise might operate in her favour as to the other estates; besides which the republication after her death put the matter beyond doubt. They cited *Seifferth v. Badham* (a); *Mostyn v. Mostyn* (b); *Teatt v. Strong* (c); 1 *Jarman on Wills* (d).

Mr.

(a) 9 *Beav.* 370.

(b) 3 *De G. Macn. & G.* 140.

(c) 3 *Bro. P. C.* 219; 2 *Burr.*

910; 1 *W. Black.* 200.

(d) *Pages* 593, 599.

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Mr. *R. Palmer* and Mr. *Speed*, for the Plaintiffs.

Mr. *Roupell* and Mr. *Bromehead*, for Defendants, in the same interest.

Mr. *Lloyd* and Mr. *Faber*, for other Defendants, cited *Church v. Mundy* (a); *Goodtitle d. Daniel v. Miles* (b); *Doe d. Nethercote v. Bartle* (c); *Saumarez v. Saumarez* (d); *Miller v. Huddleston* (e); *Strong v. Teatt* (f).

Mr. *Smythe*, for *Henry Thomas Grainger* and his mother, claimed one-third by lapse.

Mr. *Greene*, for *Martha Colpitts*, the other co-heiress, cited *Cole v. Scott* (g); *Douglas v. Douglas* (h).

Mr. *Haig*, for two of the nieces and residuary legatees, cited *Williams v. Goodtitle* (i).

Mr. *R. Palmer*, in reply.

The MASTER of the ROLLS referred to *Culsha v. Cheese* (k); but reserved judgment, to enable him to examine the authorities.

Feb. 14.

The MASTER of the ROLLS.

The question here is the effect of the statute of 7 William 4 & 1 Vict. c. 26, s. 26, on the will of *Mary Colling*, a testatrix, who died on the 25th of April, 1850. The question is, whether the *Escomb*, *Headlam* and *Cockfield* Estates, the devise of which has lapsed by

- | | |
|-------------------------------|----------------------------|
| (a) 12 Ves. 426; 15 Ves. 396. | 912. |
| (b) 6 East, 494. | (g) 1 H. & Tw. 477; 1 Mac. |
| (c) 5 B. & A. 492. | & G. 518. |
| (d) 4 Myl. & Cr. 331. | (h) 1 Kay, 400. |
| (e) 3 Mac. & G. 513. | (i) 10 B. & Cr. 895. |
| (f) 3 Bro. P. C. 219; 2 Burr. | (k) 7 Hare, 236. |

by reason of the death of the devisee, fall into and pass by the residuary devise, or whether these estates go to the heir at law of the testatrix. In favour of the heir at law, it is contended, that the words of the 26th section of the statute do not apply, inasmuch as a contrary intention appears on the face of the will; first, by reason of the peculiar description of the property in this residuary devise, which it is contended points to local description; and secondly, by reason of the inconsistency of the disposition which such a construction would give rise to; for it is contended, that it is impossible to suppose that the testatrix could have intended to give her sister a life estate in a property the devise of which could only take effect by reason of the decease of that very sister. Although I reserved my judgment, in order that I might have an opportunity of considering the cases, I do not think that much difficulty exists in it, or that the claim of the residuary devisee can be successfully resisted.

After attentively considering, I dissent from the argument derived from the description. The description is in these words, viz. "*My freehold, copyhold and leasehold hereditaments not hereinbefore devised.*" I am unable to acquiesce in the argument which would treat these as merely a short mode of describing the estates, in various other places, the names of which were for brevity sake omitted. No doubt all devises of land, whether residuary or otherwise, are specific; and no doubt also, in one sense, a residuary devise, like a residuary bequest, is only a short mode of enumerating all the testatrix has not previously disposed of; but different consequences follow from the use of these general words. In the case of land, by force of the statute, and in the case of personal estate, by the long settled law, if the property be disposed of by general terms

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terms instead of by particular enumeration, it includes not merely the property not previously disposed of at the date of the will, but also all the property, which, at the death of the testator, when the will became operative, has, by force of any events, become undisposed of. But I am unable to find any just distinction upon which the Court could properly act between a devise in these words, viz. "all the rest and residue of my freehold, copyhold and leasehold estates," and a devise in the words, viz. "all my freehold, copyhold and leasehold estates not hereinbefore devised." Undoubtedly no distinction could have been properly drawn between these two forms of expression, if they had been applied to a residuary bequest of personal estate, and I am unable to find any distinction in the case of a residuary devise. The circumstance that all devises are specific explains how the doctrine arose, which the statute has thought fit to amend, but cannot, in my opinion, vary the natural meaning of the words.

I am of opinion, therefore, that this is an ordinary residuary devise, and I am confirmed in this view of the subject, by the circumstance, that the testatrix has, in two other places in her will, which I have mentioned, herself so treated it.

The second argument in favour of the heir at law appears to me to be equally inefficacious in leading to the conclusion desired. Two observations are to be made on this will, either of which are decisive, in my opinion, against the contention of the heir at law. The first is, that other property, besides that devised to *Margaret Colpitts*, might have fallen into and passed by the residuary devise, besides the property not before disposed of by her will. For instance, the *Blackwell Estate* was so devised, that, in the event either of a failure

failure of issue of *John Colpitts Dean*, or of his coming into possession of the *Aislaby* Estate, by reason of the failure of the previous limitations in favour of *Thomas C. Grainger* and his issue, it was to fall into the residue.

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This, therefore, removes the inconsistency which might be relied upon, if none but the property devised to *Margaret Colpitts* could, in any event, have lapsed or passed by the residuary devise, other than the property included in it when the will was made.

The second observation is this:—That the testatrix has republished her will, and left these dispositions unchanged, after the death of her sister, and when she was aware that the sister could take nothing under her will. The will and codicil, therefore, must be read together, as if made at this date,—why did she not notice that circumstance and make a corresponding alteration in the will? The answer appears to me to be obvious; she believed that the effect of the lapse would simply be to throw the property devised to her sister into the residue, and to accelerate the estates to her nieces therein, so as to take effect immediately on her own decease. And this is, in my opinion, the correct construction of the will; and I am of opinion, that this is the ordinary case to meet which the clause in the statute was introduced:—that this is a residuary devise which passes the estates included in the devise to *Margaret Colpitts*, and which has lapsed by reason of her death before that of the testatrix, and that nothing is to be found in this will, from whence a contrary intention can be discovered.

I will make a declaration, therefore, and decree accordingly.

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STAR *v.* NEWBERRY.

March, 8, 19.

The affidavit in support of an application for an order to appoint a guardian to concur, on behalf of an infant, in a special case under Sir *G. Turner's Act*, ought to be intituled "In the matter of the act" and "In the matter of the infant," and not "In the special case."

AN order having been made in this case, for the appointment of a guardian to concur in a special case under Sir *George Turner's Act* (a), on behalf of an infant, the Registrar refused to pass the order, upon the ground that the affidavit as to the fitness of the proposed guardian was entitled *In the special case*, whereas it ought to have been entitled "In the matter of the infant."

Mr. *Tudor*, on behalf of the infant, applied to the Court to allow the order to be passed without another affidavit, or, at all events, upon the amendment of the present affidavit. He stated, that the practice of the Registrars in cases of this kind was not uniform, affidavits similarly entitled having been considered by one of the Registrars to be regular.

The MASTER of the ROLLS was of opinion that the affidavit ought to be entitled, not only "In the matter of the infant," but also "In the matter of the act." He thought, that it was irregular to entitle the affidavit "In the special case," inasmuch as at the time when the affidavit was filed, the special case was not on the file, and could not, therefore, be considered as in existence. The affidavit, he said, ought therefore to be amended by entitling it "In the matter of the act and in the matter of the infant."

(a) 13 & 14 *Vict. c. 35*, s. 5.

1855.

JEFFERIES v. MICHELL.

THE testator by his will, dated in 1844, expressed himself as follows:—"After the payment of my debts, I give my wife, *Mary Michell*, 20*l.*, and 17*l.* per year during her life." He then devised several real estates and bequeathed several legacies "in cash" to different members of his family. He then proceeded as follows:—"I give my granddaughter, *Elizabeth Bawden*, 150*l.* in cash; my son *John* 200*l.* in cash, two months after my decease; my son *Stephen* 250*l.*; my son *Thomas* 250*l.*, and the residue of my effects shall be divided equally between my executors, who are to pay all my bequests only to the individuals herein named." "I appoint my sons *Stephen* and *Thomas Michell* my executors and joint trustees for the aforementioned persons."

The testator died in 1845. At the date of his will he had two granddaughters named *Elizabeth Bawden*; one (the Plaintiff) the daughter of *Elizabeth Bawden*, and the other the daughter of *Mary Bawden*. The Plaintiff came of age in *June*, 1846, and in *November*, 1846, she married the Plaintiff *Jefferies*.

The father of the Plaintiff *Mrs. Jefferies* had died, leaving her his only child, then an infant of a year old, and thereupon the testator took *Mrs. Jefferies*, whom he offered to adopt, and her mother to reside with him at his house in *Redruth, Cornwall*; they remained with him for a year and a half, when the mother married *Driffield*, with whom they removed to *Saint Austell*.

While

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Gift to "my grand-daughter, *E. B.*" There were two of that name, one of them constantly visiting the testator and much noticed by him, and the other not. Held, that the former was entitled to the legacy.
"After payment of his debts" the testator gave certain legacies, one of 150*l.* to *E. B.*, and he directed his executors to pay "my bequests only to the individuals herein named." The testator owed *E. B.* 150*l.* Held, that the legacy was not a satisfaction of the debt, but that *E. B.* was entitled to both.

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While at *Saint Austell*, however, Mrs. *Jefferies* was constantly in the habit of visiting the testator, and staying with him for several months.

After remaining at *Saint Austell* for six years, Mr. and Mrs. *Driffield*, and their daughter, returned to *Redruth*, where they remained for two years, and then removed to *Saint Ives*. While at *Redruth*, Mrs. *Jefferies* was in the habit of seeing her grandfather daily, and when at *Saint Ives* of paying him constant visits. Her mother having ten children by her second marriage, the testator used, on that account, to take more notice of her, and on her returning to *Redruth* apprenticed her there, and paid the premium. In June, 1844, she went on a visit to the testator, and remained till the 22nd July; but there was some discrepancy in the evidence as to the visits at the time the will was made, and as to where she stayed. In a book kept by the testator, there were entries of sums due to *Elizabeth Bawden*, amounting to the sum of 150*l.*; it was not stated which *Elizabeth Bawden*, but it was admitted that those sums were due to Mrs. *Jefferies*. The other *Elizabeth Bawden* was one of five children of another daughter of the testator, and had never resided with nor been particularly noticed by him.

The executors having refused to pay the legacy of 150*l.* to Mr. and Mrs. *Jefferies*, on the ground that it was doubtful which granddaughter was intended, the latter filed this bill to compel payment.

Mr. *R. Palmer* and Mr. *Darling*, for the Plaintiff. There are two questions to be decided in this case; one as to the personal identity of the legatee, and the other whether the legacy is a satisfaction of the debt. As to the legatee intended by the testator, there is an ambiguity,

guity, which, being latent, parol evidence is admissible to explain it. This has accordingly been taken, and shows clearly, that the testator had constant intercourse with and took great interest in, Mrs. *Jefferies*, and that he never paid any particular attention to the other granddaughter. The presumption therefore is, that he meant Mrs. *Jefferies*; *Doe d. Westlake v. Westlake* (a).

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As to the satisfaction of the debt by the legacy, that principle does not apply to the present case; for here the bequests are made "after payment of the testator's debts," and the gift of the residue to the executors is accompanied with a direction "to pay all my bequests only to the individuals herein named." Where there is an express direction for payment of debts and legacies in the will, a legacy to a creditor of the testator is not a satisfaction of a debt due to him. Consequently Mrs. *Jefferies* is entitled to the 150*l.* legacy, as well as the debt; *Field v. Mostyn* (b); *Lethbridge v. Thurlow* (c); 2 *Rop. Leg.* (d); and see *Hales v. Darell* (e).

Mr. *Follett* and Mr. *Nicholls*, for the executors, *contra*. It is impossible to ascertain which of the two granddaughters was meant. It is a mere matter of conjecture, and therefore the bequest fails for uncertainty.

Secondly, the debt was satisfied by the legacy. It is shown by the account book to have been exactly of the same amount. In *Wathen v. Smith* (f) a covenant in a settlement, to leave a sum by will, was held to be satisfied by a legacy to the same amount, though followed by a general direction for payment of debts. In

Chancey's

(a) 4 *B. & Ald.* 57.

(b) *Dick.* 543; 3 *Anstr.* 831, n.

(c) 15 *Beav.* 334.

(d) Page 1051 (4th edit.).

(e) 3 *Beav.* 324.

(f) 4 *Mad.* 325.

1855. *Chancey's Case* (a), a bequest of 500*l.* was held to be a satisfaction of a bond debt for 100*l.* ; and in *Gaynon v. Wood* (b), a bequest of 500*l.* was held to be a satisfaction of a debt of 200*l.*

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Mr. *R. Palmer*, in reply.

The MASTER of the ROLLS.

I think the Plaintiffs have made out their case. On the question as to which of the two granddaughters was intended, I am of opinion that there is not so much doubt, that the Court must hold the gift void for uncertainty. The facts that the Plaintiff lived with the testator one year and a half when a child, and that he offered to adopt her, are strong in her favour. These very account books, are sufficient to show that the Plaintiff was constantly present to his mind ; and he owed her money, he kept her accounts apart, she lived with him, and he apprenticed her. But with respect to the other *Elizabeth Bawden*, there is a total absence of any evidence pointing to any close relation between her and the testator. When I find the one constantly present to the testator's mind and the other not, the natural presumption is, that the legacy was intended for the former. The observation on the account book, that although the name of *Elizabeth Bawden* is repeatedly stated in it, there is nothing to mark which was intended, is removed by the admission, that in one place the name necessarily referred to the Plaintiff, to whom the sum was owing, and the presumption is, that the same *Elizabeth Bawden* was intended throughout. It is said, that probably the offer of adoption being refused, the testator's preference might have been removed, but this is repelled by the fact that they were afterwards on
very

(a) 1 *P. Wms.* 408 ; 10 *Mod.* 399.

(b) 1 *Dick.* 331.

very good terms, and constantly visiting. I am therefore bound to come to the conclusion that the Plaintiff was the *Elizabeth Bowden* intended, and that this legacy of 150*l.* belongs to her.

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I cannot hold that this legacy of 150*l.* was a satisfaction of the 150*l.* debt due from the testator to the Plaintiff. In the first place, he puts this legacy in the same situation as all his other legacies. He says, "after payment of my debts," I give certain legacies in cash; they are all exactly in the same position. It is possible that the testator supposed that this granddaughter could not take both the debt and legacy; but nothing is said in the will; on the contrary, there is an express direction to pay both the debts and the legacies, and the legacies are to be paid "to the individuals."

The result is, that if the testator had a different intention, he has failed to express it, and I therefore think that both the debt and legacy are payable to the Plaintiff.

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The partnership between A. and B. was dissolved and A. retired. A., by deed, agreed to execute an assignment to B. of the partnership assets (part of which consisted of a policy of which the partners were assignees), and B. was to covenant to pay the debts and indemnify A. against them. No further deed was executed. A. died, and B. afterwards assigned the policy to a purchaser who had notice of the deed. A.'s executors were afterwards compelled to pay partnership debts which ought to have been discharged by B. The policy being adversely claimed by the purchaser and by A.'s executors, Held, that though A. and his executors were entitled to pursue any portion of the partnership property in the hands of B., and have it applied in payment of the partnership debts, yet that they had no such right as against the purchaser from B. though with notice, for he was not bound to see to the application of the purchase-money.

A. (a retiring partner) agreed to assign a policy (part of the partnership assets) to B. (the continuing partner) on certain terms. B. mortgaged it to C., who gave notice to the office. B. afterwards became bankrupt. Held, that the policy was not within the order and disposition of B. either as against A. or C.

In re LANGMEAD's Trusts.

WILLIAM LANGMEAD and *John Clark Langmead* were partners in a brewery. Part of their assets consisted of a policy of assurance effected in the name of Mr. *Windsor*, and by him assigned to the partners.

In 1825, *John Clark Langmead* retired, and by a deed executed by the partners dated the 5th of *February*, 1825, it was agreed that the partnership should stand dissolved; that general releases should be executed between both parties; that *William Langmead* should pay to *John Clark Langmead* the sum of 2,000*l.*, and that in consideration thereof, *John Clark Langmead* should convey and assign to *William Langmead* all the partnership stock, and effects, and all debts due to the concern, together with all mortgages, bonds, and other securities, &c., and all benefit and advantage to arise from

DATES.

1825. Dissolution.
1830. *John* died.
1831. Assignment to *Boyd*.

1838. Notice to office.
1840. *William* bankrupt.
1841. Policy payable.

from the said trade or business, and also all his share in the freehold and leasehold messuages and hereditaments belonging to the partnership, subject to the performance of the covenants and the discharge of the incumbrances affecting the same. And it was by this indenture agreed, that for the purpose of carrying it into effect, all proper and necessary deeds should be executed between the parties; and that in the deeds, to be so executed, there should be contained a covenant on the part of *John Clark Langmead*, that he would, after the 25th of *March* then next following, do all lawful and necessary acts, at the expense of *William Langmead*, for recovering any of the debts due to the firm, and for the purpose of enabling him to sell or dispose of all or any of the lands and property belonging thereto, and that he would enter into all necessary and other assurances for all or any of the purposes aforesaid; and also, that these deeds should contain a covenant, on the part of *William Langmead*, that he would pay all the debts and demands of or upon the concern, and indemnify *John Clark Langmead*, and his estate, against the same.

No further deed was executed in pursuance of the covenant contained in this deed, but under it *William Langmead* took possession of all the partnership property, stock and effects, including the policy of insurance on the life of Mr. *Windsor*; and he, thereafter, carried on the business on his own account.

Willam Langmead paid the 2,000*l.* to *John Clark Langmead* a considerable time after the dissolution of the partnership. He did not, however, pay all the debts due from the firm, though during the life of *John Clark Langmead* no claim was made on him by any partnership creditor.

John

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John Clark Langmead died in 1830, having, by his will, given all his real and personal property to the present Petitioner.

On the 1st of *September*, 1831, about eight months after the decease of *John Clark Langmead*, *William Langmead* assigned the policy effected on the life of *Mr. Windsor*, and other property, to *Walter Boyd*, to secure the repayment of 4,000*l.* then advanced to him by *Walter Boyd*. *William Langmead*, at the same time, gave *Walter Boyd* a power of attorney to receive the sums to become payable on the policy. Subsequently to this, in a suit for administering the estate of *John Clark Langmead*, several persons who were creditors of the firm at the date of the dissolution of the partnership, came in and proved debts, amounting in the whole to 1,373*l.*, and which were paid out of the estate of *John Clark Langmead*. These were debts which, in accordance with the indenture of dissolution of the 6th of *February*, 1825, *William Langmead* was bound to pay, and against which he had covenanted to indemnify both *John Clark Langmead* and his estate.

At the time of the execution of the assignment of 1st of *September*, 1831, *Walter Boyd* had express notice of the deed of 5th *February*, 1825, and that this policy formed part of the partnership assets which had been taken by *William Langmead*, and consequently he had express notice that *William Langmead* was bound to pay the debts of the partnership, and to indemnify *John Clark Langmead* and his estate against them.

In 1837, *Mr. Boyd* died, and in 1838, his executors gave notice to the insurance company of the assignment of *Windsor's* policy to their testator by the deed of the 1st of *September*, 1831.

On

On the 23rd of *June*, 1840, *William Langmead* became bankrupt, and his assignees assigned the policy in question to a person of the name of *Watts*.

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In 1841, *William Windsor* died, and, in consequence of adverse claims, the amount received on this policy was paid into Court. It was claimed, firstly, by the Petitioner, who was entitled to *John Clark Langmead's* estate; secondly, by the executors of *Walter Boyd*; and thirdly, by *Watts*, claiming under the assignees of *William Langmead*, who insisted that it was within the order and disposition of the bankrupt, at the time of the bankruptcy.

Mr. *Follett*, in support of the petition for payment to the residuary legatee of *John Clark Langmead*, contended, that the policy, being partnership property, formed part of the joint assets, and was primarily applicable to the payment of the joint creditors; and that, until the assignment had been perfected, and the indemnity given, *William Langmead* had no power to dispose of any more than his share, after discharging the joint liabilities. He argued also, that by the deed of dissolution the policy was to be assigned, subject to the incumbrances affecting the same, and that the produce of it was applicable, in the first place, to the payment of the partnership debts, and *Boyd*, having full notice of these facts, was bound by all the equities between the partners, and could claim no more than his assignor, who in equity was bound to apply the produce of the policy in exonerating his copartner from partnership liabilities; that the covenants in the deed not having been performed, the estate of *John* was entitled to be recouped, out of the produce of the policy, the amount of the debts which it had paid, and against which it was to be indemnified.

Mr.

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Mr. *Lloyd* and Mr. *Nalder*, for *Boyd's* executors, contended, that the assignment to him was valid, and being perfected by notice to the insurance company, his title was indisputable. That the very object of the deed of dissolution was to give to the continuing partner the power of realizing the assets, for payment of the partnership debts, and which power the surviving partner possessed independently of the deed of dissolution. That the purchaser, though with notice, was not bound to see to the application of the purchase-money in payment of debts not specified, and that the surviving partner had, by law, full power to sell and pledge the assets. They cited *Burridge v. Row* (a); *Clack v. Holland* (b); *Jenkins v. Hiles* (c); *Gibson v. Goldsmid* (d).

Mr. *C. T. Simpson*, for the executors of *Watts*, contended that the policy was within the order and disposition of the bankrupt, and belonged to his assignees. He referred to *Gibson v. Oldfield* (e).

Mr. *Wickens*, for the trustees.

Mr. *Follett*, in reply.

*The MASTER of the ROLLS* reserved judgment.

Feb. 13.

*The MASTER of the ROLLS.*

The question is, who is entitled to the money in Court which represents the policy?

The

- (a) 1 *Y. & C.* (C. C.) 183.
- (b) 19 *Beav.* 262.
- (c) 6 *Ves.* 646.

- (d) 18 *Beav.* 584, reversed by the Lords Justices, Dec. 2, 1854.
- (e) 4 *Car. & P.* 313.

The claimants are, the Petitioner, who, being the sole residuary devisee and legatee of *John Clark Langmead* (all of whose debts have been paid in the suit instituted for the administration of his estate), is the person entitled to this money, if the claim of *John Clark Langmead's* estate can be substantiated. This claim, however, is contested, on one hand by the executors of *Walter Boyd*, who claim under the deed of the 1st of *September*, 1831, and also by the executors of *Watts*, who claim under the assignment from the assignees of *William Langmead*. The claim of the executors of *Watts* may, I think, be very shortly disposed of: he claims the policy money on the ground that the policy was in the order and disposition of the bankrupt at the date of the bankruptcy, and that therefore the assignees of the bankrupt were entitled to assign it to Mr. *Watts*. But this was not so, for the notice to the insurance company given in *February*, 1838, by the executors of *Walter Boyd*, which was prior to the bankruptcy of *William Langmead*, removes any question on this subject. I am of opinion, therefore, that the claim of the executors of Mr. *Watts* must fail.

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The contest between the Petitioner and the executors of *Walter Boyd* is not so easily disposed of; but on the whole, I am of opinion, that the claim of the executors of *Walter Boyd* is the preferable one, and that it must prevail. I do not doubt, that *John Clark Langmead* was, or that his executors after his decease were, entitled to pursue and specifically to apply, towards the payment of the debts of the partnership, any portion of the partnership property which they could point out to be in existence in the hands of *William Langmead*; but, when this property had got in the hands of an assignee or purchaser for value from *William Langmead*, a different class of considerations arises. I think that the  
 case

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case of the Petitioner cannot be put higher than one of an express trust vested in *William Langmead*, to sell the property and apply the proceeds in payment of the debts of the partnership. If that had been the case, a purchaser from *William Langmead*, even with express notice of that trust, would not have been bound to see to the application of the purchase-money. This is settled by many cases which I had to consider lately in a case of *Robinson v. Lowater*(a).

The case before me is, I think, weaker than the case I have suggested ; it certainly cannot, in my opinion, be put higher than this :—viz., that *John Clark Langmead* was entitled to have property applied in payment of the partnership debts as long as any debts existed ; but even that right, under the agreement of the 5th of *February*, 1825, only continued until *William Langmead* had executed a proper indemnity to secure *John Clark Langmead* against the debts of the firm. Such an indemnity *John Clark Langmead* might have compelled *William Langmead* to execute ; but, for a period of nearly six years, he continued satisfied with the matter remaining as it stood, simply in covenant ; and then, upwards of six years after the dissolution of the partnership, when *Walter Boyd* might reasonably have supposed that all the debts of the concern had been either paid or barred by lapse of time, and when no claim had been made by any creditor on *John Clark Langmead* or on his executors, or by them against *William Langmead*, *Walter Boyd* takes an assignment for value of part of the partnership property. This is, in my opinion, a valid transaction, constituting him the real owner of the property so assigned in priority to any

(a) 17 *Beav.* 592.

any claim which *John Clark Langmead*, or his estate, could have thereon.

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If I was to hold otherwise, the result would be, that in the case of the dissolution of partnership, by a deed similar to that before me (a case of common occurrence), the partner continuing to carry on the business would be paralyzed in his efforts; he would be unable to dispose of any portion of the partnership property, as no one would purchase property at its fair value, under the apprehension of its being afterwards laid hold of, as specifically liable to pay the partnership debts, which the continuing partners might have omitted to discharge.

I am of opinion, in this case, that the executors of *Walter Boyd* are entitled to have the money and exchequer bills in Court applied, as far as may be necessary, in payment of the amount due on the mortgage security of the 1st of *September*, 1831; but I am of opinion, that the Petitioner is entitled to the balance, if any, remaining after that payment.

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NOTE.— Affirmed by the Lords Justices, *July 12*, 1855.

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1855.

## BAINBRIGGE v. ORTON.

Jan. 19.

The Plaintiff described himself as of "Gray's Inn, Barrister at Law, and of No. 2, Cloisters, Middle Temple." The Defendant pleaded that the description was false, and that the Plaintiff was not resident at No. 2, Cloisters, Middle Temple. Held, that the plea was bad in form, not negating a residence at Gray's Inn.

But, *quere*, whether, even if correct in form, such a plea could be supported.

THE Plaintiff described himself as "*William Arnold Bainbrigg*, of *Gray's Inn*, Barrister at Law, and of No. 2, *Cloisters, Temple*, in the city of *London*." One of the Defendants put in a plea in these words:—"that the Plaintiff in the said bill is described as a Barrister at Law, and of No. 2, *Cloisters, Middle Temple*, in the city of *London*, whereas such description is false, the fact being, that the said Plaintiff is not now, nor was he at the time of filing of the said bill in this suit, nor has he ever since been resident at the said No. 2, *Cloisters, Middle Temple*, in the city of *London* aforesaid, nor was his residence or place of abode known to me at the date of his filing the said bill, nor has it ever since been, nor is it now known to me; but that the said Plaintiff keeps his true residence a secret from me."

Mr. *H. M. Wright*, for the Defendant. Though the form of this plea is unusual, yet there is authority to support it. At law such a plea is valid; *Comyn's Digest* (a). The mode pursued at law is to claim *oyer* of the writ, and if the name or address is shown to be false, it is held a sufficient ground to stop the proceedings. [*The Master of the Rolls*. That is the case of pleas in abatement, of which we know little or nothing in this Court.] The plea is not a novel one in equity, and can be supported both by principle and authority. The true address is one of the formal requisites to a bill; *Mitford* (b); and a Defendant by plea

(a) *Abatement*, E, 22.

(b) Page 42 (4th edit.).

plea may take advantage of any substantial want of form, or he may plead that a Plaintiff "does not sustain the character he assumes; *Mitford* (a)."

1855.

  
BAINBRIDGE  
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In *Rowley v. Eccles* (b), the Defendant pleaded that the Plaintiff did not reside at the place stated in the bill, and it was held, that after demurrer overruled, the Defendant could not plead without leave of the Court; thus implying, that the plea itself was valid. In *Smith v. Smith* (c), Vice-Chancellor Wood considered such a plea good, and the present plea has been formed on the model of the one filed in that case, varied however to meet the objection there made to it by Vice-Chancellor Wood. The address No. 2, *Cloisters, Middle Temple*, is the address of the Plaintiff's solicitors, as appears by the bill, but it is not the Plaintiff's address, which the Defendant has a right to know. Though this plea is based on somewhat technical grounds, yet technical rules are intended to produce substantial justice and prevent evasion. [*The Master of the Rolls*. Is not the proper mode, according to modern practice, to apply for security for costs in cases of misdescription?] The Defendant is now in contempt for want of an answer, and could not, therefore, have made the application, and the only course left him was to plead. He referred to *Hudson v. Hudson* (d); *Mitf. Pleading* (e).

Mr. R. Palmer, *contrà*. This, being a dilatory, must be treated strictly. The case of *Smith v. Smith* decides nothing, for it was disallowed. Though a plea to the person, *in the nature* of a plea in abatement, may be pleaded in equity, yet no such plea as the present is enumerated

(a) Page 230.

(b) 1 *Sim. & Stu.* 511.(c) 1 *Kay, App.* xxii.(d) 1 *Sim. & Stu.* 512.

(e) Pages 216, 217.

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enumerated in the books; *Redesdale* (a); *Beames on Pleas* (b). At law, a plea in abatement goes to the whole case, and, being allowed, the cause is out of Court; but in equity, it is a mere matter of amendment. The practice, in cases of misdescription, has always been to apply for security for costs, and this furnishes full protection to a Defendant. But here, the right to move for security for costs has been lost, and it would be an extraordinary proposition to say, that when the right to obtain security for costs has been lost by waiver, the Defendant can, by such a plea, stop the suit.

Secondly, the plea is bad in point of form, for it does not negative the whole description, which is "*William Arnold Bainbridge, of Gray's Inn, Barrister, and 2, Cloisters, Temple.*" The plea does not negative the first part of the description, for "*Gray's Inn*" is to be intended as descriptive of his residence there, and not of his being a barrister of that Inn of Court. This is not covered by the plea. It is also informal for duplicity, for it raises a question as to the Defendant's knowledge of the Plaintiff's address. He cited *Rigby v. Rigby* (c); *Emmott v. Mitchell* (d).

Mr. *Wright*, in reply, contended that "*Gray's Inn, Barrister,*" was a description of the person and not of the place of residence.

#### *The MASTER of the ROLLS.*

If the latter part of the description had been omitted, I should be of opinion that there was a sufficient address  
 on

(a) Page 226 (4th edit.).  
 (b) Pages 56, 121.

(c) 15 Sim. 90.  
 (d) 14 Sim. 432.

on this bill. The sentence would then run thus: humbly complaining sheweth unto your Lordship "*A. B.*, of *Gray's Inn*, Barrister at Law." If it had stopped there, the Defendant could not have objected that the address of the Plaintiff had been omitted, for *Gray's Inn* is as much a place of residence as the *Temple*, *New Inn* or *Clement's Inn*. But if the Plaintiff had described himself as being a Barrister of the Society of *Gray's Inn*, I agree there would be no address. This plea, therefore, does not cover the whole address, but merely negatives the residence in the *Temple*, and in my opinion it is insufficient.

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I wish particularly to guard myself against its being supposed that I have said anything to countenance the doctrine, that such a plea as this can be maintained. It is new to me. I have never, in practice, met with one like it, and it is difficult to reconcile it with the principles and practice of the Court. The ordinary mode of proceeding in such cases is to move for security for costs.

Overrule the plea.



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## PALMER v. NEWELL.

March 13, 14.

In 1838, *A. B.* executed a voluntary deed, securing, out of his estate, life annuities to seven persons, payable on his decease. In 1851, he executed another voluntary deed, covenanting to pay annuities very dissimilar in their nature to five of the same persons. Held, that the latter were not substitutional for the former. *A. B.*, by two deeds, made provision for his natural children and their mothers. Held, that the fact that the settlor could not place himself in *loco parentis* as to the latter, showed that it was not his intention to do so as to the former.

On a question of construction of a deed, parol evidence is inadmissible to show the intention of the parties thereto.

BY an indenture, dated 10th of *August*, 1838, Sir *John Chichester*, for a nominal consideration, demised a freehold estate to *Lozon, Newell, Robert B. Chichester* and *Witham*, for 1,000 years, to commence on his death, upon trust to raise the following life annuities: an annuity of 100*l.* for *Sarah Lavallin* for life, an annuity of 100*l.* for her son *Robert Bruce* for life, an annuity of 52*l.* for *Sarah Benham* for life, an annuity of 52*l.* for her daughter *Sarah Palmer Benham* for life, an annuity of 20*l.* for *Elizabeth Hellyer*, the wife of *William Hellyer*, for life, an annuity of 40*l.* for *Eliza Hellyer* (the daughter of *Elizabeth* and *William Hellyer*) for life, an annuity of 40*l.* for *Elizabeth* (the eldest daughter of the said *Elizabeth Hellyer*) for life. These seven annuities were to be paid by equal half-yearly payments on the 25th day of *March*, and the 29th day of *September*, in every year. And the annuities to females were to be paid to their separate use. Power was thereby reserved to the settlor to revoke this deed by any deed "attested by two or more credible witnesses, or by his last will."

The deed was executed by the settlor alone, but was attested by one of the trustees.

In 1839 *Sarah Benham*, one of the annuitants, married *Hull*, and in 1840 *Elizabeth Hellyer*, another annuitant, died.

By

By another indenture, dated the 27th of *June*, 1851, and made between Sir *John Chichester* of the one part, and *James* and *Robert B. Chichester* of the other part, after reciting that Sir *John* was desirous of securing the payment, after his decease, of the several annuities thereafter mentioned, to the persons thereafter named, and that *James* and *Robert B. Chichester* had agreed, at his request, to be trustees for enforcing the covenants thereafter contained, Sir *John*, for divers good causes and considerations, covenanted with the trustees, that in case *Sarah Lavallin* should survive Sir *John*, and her son *Robert Bruce* should be living and under the age of twenty-one years, at the decease of Sir *John*, he, his executors, &c., would pay to *Sarah Lavallin* an annuity of 150*l.* until *Robert Bruce* should attain twenty-one years, or die under that age (such annuity to continue whether *Sarah Lavallin* should remain single or marry). And further, that immediately after *Robert Bruce* should attain twenty-one, or die under that age (in case he should be living and under the age of twenty-one years at the decease of Sir *John*, and *Sarah Lavallin* should be then living, and a spinster), or from and immediately after the decease of the said Sir *John* (in case *Robert Bruce* should have attained the age of twenty-one years, or died under that age in the lifetime of Sir *John*, and *Sarah Lavallin* should be living and a spinster, at the decease of Sir *John*), the heirs, &c., of Sir *John* would pay *Sarah Lavallin* an annuity of 100*l.* during her life, until she should marry. And further, that in case *Sarah Lavallin* should survive Sir *John*, and should marry, then his heirs, &c., would, from her marriage, or from the decease of Sir *John*, or from the time when *Robert Bruce* should attain twenty-one years, or die under that age, pay her an annuity of 50*l.* for life. And in case *Robert Bruce* should survive Sir *John*, and should attain twenty-one, then the heirs,

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&c., of Sir *John* would pay *Robert Bruce*, from the decease of Sir *John*, or from *Robert Bruce's* attaining twenty-one, and during the life of *Robert Bruce*, such annuity as is hereinafter mentioned (that is to say), in case *Sarah Lavallin* should have died or married before the now stating covenant should come into operation, an annuity of 100*l.* during the life of *Robert Bruce*; and in case *Sarah Lavallin* should be living and a spinster, when the covenant should come into operation, an annuity of 50*l.* during the joint lives of *Robert Bruce* and *Sarah Lavallin*, or until she should marry, in the lifetime of the said *Robert Bruce*, and after the decease or marriage of *Sarah Lavallin*, in the lifetime of *Robert Bruce*, an annuity of 100*l.*, during the life of *Robert Bruce*. And further, that in case *Eliza Hellyer* should be living at the death of the said Sir *John*, his heirs, &c., would pay her an annuity of 20*l.* for life. And in case *Sarah Palmer Benham* should be living at his decease, his heirs, &c., would pay her an annuity of 20*l.* for life. And further, that in case *Elizabeth Damer* (formerly *Handcock*) should be living at the decease of Sir *John*, his heirs, &c., would pay her an annuity of 15*l.* for life. And it was provided, that the annuities should be paid by half-yearly payments, and that the first of the said half-yearly payments (except as therein mentioned) should be made at the expiration of six calendar months next after his decease. But it was thereby provided, that in case any of them, *Sarah Lavallin*, *Robert Bruce*, *Eliza Hellyer*, *Sarah Palmer* and *Elizabeth Damer*, should, at any time, remain more than twenty-four hours, during any twelve months, at the then present mansion-house of Sir *John*, then and in such case, and immediately thereupon, their annuities should cease.

This second deed was executed by Sir *John* and by  
 one

one of the trustees. The several annuitants were Sir *John's* natural children and their mothers.

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Sir *John* made his will in *June*, 1851, and he died in *December* following. The deeds were found in the possession of Mr. *Norris*, the successor in business of Mr. *Witham*, the family solicitor and the trustee of the deed of 1838. This suit was instituted by *Sarah Palmer Benham* and *Eliza Hellyer*, to compel payment of the annuities. The annuitants claimed both sets of annuities, but this was resisted by the testator's heir and the other parties interested in his estate, on the following grounds:—First, that the deed of 1838 was voluntary, and had not been executed by the trustees and annuitants so as to make it operate. Secondly, that it had not been finally delivered by Sir *John*, but had continued in the possession of his solicitor as an *escrow*. Thirdly, that Sir *John*, when he executed the deed of 1831, had forgotten the existence of the deed of 1838, and had executed the second deed under a mistake. Fourthly, that the deed of 1838 was of a testamentary character, and had been revoked by the will of 1851. Fifthly, that one set of annuities were substitutional for the other, and that the parol evidence proved, that Sir *John* did not intend to give double portions. Sixthly, that the deed of 1838 was revoked by the deed of 1851, and by the will, by virtue of the 1 *Vict.* c. 26, s. 27, which operated as an execution of every power possessed by Sir *John*, and amongst them, of the power of revocation reserved to him by the deed of 1838.

Mr. *Bagshawe* and Mr. *Bagshawe*, jun., for the Plaintiffs; and

Mr. *Piggott*, Mr. *Speed* and Mr. *Rodwell*, for other annuitants. First, the deed of 1838 was duly executed by Sir *John*, and was binding on him and his repre-

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sentatives, *Fletcher v. Fletcher* (a). Secondly, its retention in the settlor's custody is immaterial; *Doe d. Garbons v. Knight* (b); *Exton v. Scott* (c); *Hull v. Palmer* (d). But, in reality, it was in the proper custody, viz. in that of Mr. *Witham*, one of the trustees. Thirdly, there is no evidence of the settlor having forgotten the first deed when he executed the second; on the contrary, in 1846, he executed a deed which refers to the deed of 1838. Fourthly, the instrument executed in 1838 is a deed, and is not and does not profess to be a will. Fifthly, parol evidence of the settlor's intention is inadmissible; *Hall v. Hill* (e); *Spence on Equity Jur.* (f); *Hurst v. Beach* (g); *Lee v. Pain* (h); 2 *Taylor on Evidence* (i.) But these annuities are cumulative and not substitutional. The doctrine does not apply to deeds, but merely to wills; and if it did, still the annuities are so dissimilar in quantity and quality as to prevent their being cumulative, even in the case of a testamentary gift. One set are charged on the real estate, the other are mere personal charges, the trustees are different, the amounts are not the same, and the limitations and restrictions on them are totally different. The testator did not place himself *in loco parentis*, and as to some of the annuitants, the relation between them and the settlor rendered that impossible. Sixthly, a will cannot, unless by express terms, operate as a power of revocation; this was settled by the Lords Justices in *Pomfret v. Perring* (k), reversing the decision of this Court.

They also cited 2 *Roper on Legacies* (l).

Mr. *J. H. Law*, for the trustees of the deceased.

Mr.

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| (a) 4 <i>Hare</i> , 67.           | (g) 5 <i>Mad.</i> 351.      |
| (b) 5 <i>Barn. &amp; Cr.</i> 671. | (h) 4 <i>Hare</i> , p. 216. |
| (c) 6 <i>Sim.</i> 31.             | (i) Page 792.               |
| (d) 3 <i>Hare</i> , 532.          | (k) 18 <i>Beav.</i> 618.    |
| (e) 1 <i>Dru. &amp; War.</i> 94.  | (l) Page 995.               |
| (f) Page 567.                     |                             |

Mr. *R. Palmer* and Mr. *Amphlett*, *contrà*. On the first and second points, the deed was voluntary, and was retained, and its contents were never communicated to the annuitants. It is therefore inoperative; *Naldred v. Gilham* (a); *Boughton v. Boughton* (b); *Birch v. Blagrove* (c); *Brackenbury v. Brackenbury* (d); *Cecil v. Butcher* (e); *Uniacke v. Giles* (f). In *Exton v. Scott* the deed was for valuable consideration; and in *Doe d. Garnons v. Knight* the delivery was found by the jury. Thirdly, it is proved that Sir *John* had forgotten the first deed when he executed the second. Parol evidence is admissible to show this, for the Court, to interpret the documents, must place itself in precisely the same position as the testator, and take cognizance of all the circumstances under which the second deed was executed. Fourthly, the document of 1838 was testamentary, for it was only to operate on death, and it contained a power of revocation; *Rigden v. Vallier* (g); *Ward v. Turner* (h); *Tomkyns v. Ladbroke* (i); *Harbergham v. Vincent* (k); *Masterman v. Maberley* (l); In the Goods of *Knight* (m); *The Attorney-General v. Jones* (n); *Thorold v. Thorold* (o); *Williams on Executors* (p); *Acaster v. Anderson* (q). Fifthly, the gifts are substitutional. The settlor placed himself *in loco parentis*, this Court leaning against double portions, and the latter benefits must be held to be in substitution or satisfaction of the former; *Trimmer v. Bayne* (r); *Pym v. Lockyer* (s); *Powys v. Mansfield* (t); Lady *Thynne*

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(a) 1 *P. Wms.* 577.

(b) 1 *Atk.* 625.

(c) *Amb.* 264.

(d) 2 *Jac. & W.* 391.

(e) *Ibid.* 565.

(f) 2 *Molloy*, 257.

(g) 2 *Ves. sen.* 252.

(h) *Ibid.* 431.

(i) *Ibid.* 591.

(k) 2 *Ves. jun.* 238.

(l) 2 *Hagg.* 248.

(m) *Ibid.* 554.

(n) 3 *Price*, 368.

(o) 1 *Phillimore*, 1.


(p) Part I., Book 2, Chap. 2,  
Sect. 3.

(q) 19 *Beav.* 161.

(r) 7 *Ves.* 508.

(s) 5 *Myl. & Cr.* 29.

(t) 3 *Myl. & Cr.* 359.

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 *Booker v. Allen* (c); *Lloyd v. Harvey* (d); *Sheffield v.*  
 PALMER *The Earl of Coventry* (e); *The Earl of Durham v. Whar-*  
 v. *ton* (f); *Savage v. Carroll* (g); *Linguen v. Souray* (h).  
 NEWELL. On the sixth point they relied on 1 Vict. c. 26, s. 27.

*The MASTER of the ROLLS.*

With respect to the validity of the first deed, I am disposed to send that question to be tried by an action at law, putting the heir at law upon terms not to set up any outstanding legal estate. I should not do so, if I thought that the Plaintiff had failed upon the other part of the case, and that, on equitable considerations, the provisions made by it had failed. In the observations, therefore, which I am about to make, I will assume that this is a good deed, and that it does not operate as a will. On that assumption, I am of opinion that there has been no revocation. In the first place, I am of opinion, that the second deed does not operate as an exercise of the power of revocation reserved by the first, because it is to be attested by two or more credible witnesses, and the second deed is attested by one witness only. I am also of opinion, that *Pomfret v. Perring* is an authority showing, that although a will does, by virtue of the statute, operate as a general exercise of all powers of appointment, yet that it does not operate as an exercise of a power of revoking a previous instrument. That decision of the Lords Justices is binding upon me, and therefore I must hold, that the will did not operate as a revocation of the deed.

Assuming,

(a) 2 H. L. Cas. 131; 1 Keen,  
769.

(b) 2 Russ. & Myl. 251.

(c) *Ibid.* 270.

(d) *Ibid.* 310.

(e) *Ibid.* 317.

(f) 3 Cl. & Fin. 146; 5 Sim.  
297.

(g) 1 Ball & B. 265.

(h) *Prec. in Ch.* 400.

Assuming, then, both deeds to be subsisting, the question I have to consider is, whether they confer double portions or not. I will, for the present, exclude from my consideration, whether the grantor of the deed stood in the position of a parent towards the objects of his bounty, that is, whether he had placed himself *in loco parentis* towards them. I am clearly of opinion that I cannot regard the evidence which has been given, as to the intention of Sir *John P. B. Chichester* to revoke the first deed, and to grant more portions than one, or as to whether he had forgotten the first deed. It appears, however, to me, that the evidence would amount to nothing if it were received; but I am of opinion that I cannot receive it. I adopt the conclusion expressed by Lord *St. Leonards*, in the case of *Hall v. Hill* (a), which, I think, accurately explains the principles, and which are also laid down by Sir *James Wigram*, in the case of *Lee v. Pain* (b), on which presumptions of law may be rebutted or fortified by *parol evidence*, as distinguished from the admission of parol evidence, for the purpose of explaining the meaning of expressions used in a deed, in giving a construction to it.

Then, looking at the two deeds by themselves, and excluding the consideration of Sir *John B. Chichester* being in the situation of a parent towards the objects of his bounty, I find none of the usual grounds for holding one deed to be in satisfaction for, or merely a repetition of, the former. In the first place, by the first deed he creates and vests in trustees a term in certain real estates in *Montgomeryshire*, in order that the trustees may receive the rents, and thereout pay annuities to seven persons, payable on the 25th of *March* and the 29th of *September*. By the second deed, he covenants with different

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(a) 1 *Dru. & War.* 94.(b) 4 *Hare*, 216.



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different trustees to pay different sums of money to five of the same persons; the sums not only vary in amount, but in several other different respects. Thus, an annuity of a particular amount is to be paid upon a particular state of circumstances, which is to be diminished by a certain event occurring, and to be diminished again, and to cease by other events occurring. [His Honor here observed on the differences in the other annuities, and proceeded:]—I find, therefore, those distinctions which this Court has generally relied on as material in cases of satisfaction upon wills, to show that the presumption against two provisions does not arise. This case is, in my opinion, strengthened by the circumstances that this is an instance of gifts by two deeds, and not by will, in which latter case, a testator is supposed to be disposing of the whole of his property, and distributing it amongst the different objects of his bounty. Where a person executes a deed, by which he gives certain annuities to seven persons, and sometime afterwards executes another deed, by which he gives certain other annuities to five of those persons, the presumption that one is intended to be in satisfaction or substitution for the other, appears to me entirely to fail. Both deeds ought to have their full legal effect, and the settlor must be taken to have been aware of the existence of the first deed when he executed the second.

Now, with respect to Sir *John P. B. Chichester* having placed himself *in loco parentis* towards these parties, I think that the evidence before me is not sufficient to rebut the evidence which appears upon the face of the two deeds themselves. It is to be observed, that three of the objects of his bounty, in the first deed, were persons towards whom it could not be possible for him to stand *in loco parentis*. The observation cannot possibly

sibly apply to them, though it may apply to their children. There were, as appears from the evidence, different motives and different reasons for his bounty in their favour. He considered he had a moral obligation to provide for those persons, who had been living with him in a relation to which it is not now necessary more particularly to refer. But this being a question of intention, I am at a loss to conceive upon what fair principle of construction I can properly regard his intentions towards some of the annuitants under this deed in a different light from his intention towards the others, or why he should consider the mothers of these children to be entitled to have double portions, but the children themselves to single portions only. As the presumption of his standing *in loco parentis* does not apply to the mothers, it appears to me that I cannot consider it to apply to the children, for the purpose of depriving them of one of these annuities, when, upon the face of the two instruments, it appears to me that he intended both of them to take effect.

It is not necessary for me to say more than this:—that I do not consider there is sufficient to rebut that which appears upon the face of the deed itself; I studiously abstain from saying anything respecting the validity of the first deed; but, assuming it to operate as a deed, I am then of opinion, that the annuitants are entitled to both their annuities.

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## DEVAYNES v. ROBINSON.

Jan. 27.

Cases and opinions of Counsel taken by trustees, as such merely, are not entitled to protection in a suit by the *cestuis que trust* against the trustees or their representatives.

The same rule applies to cases and opinions taken before the time when the Defendant (the representative of a trustee) admits having first heard of the questions raised by the bill.

THIS bill was filed by some of the parties interested in the estate of a testator, against the administratrix of the survivor of his trustees, and others, for an account of the estate, and for a decree against the assets of the trustees for what should be found due from them in respect thereof or of any breach of trust committed by them, or of any loss sustained by their delay in selling the real estate, which the testator had directed to be converted.

The administratrix in her answer stated, that she remembered her first husband (who had died in 1846) say, that he was a trustee of the will of the testator; but, with that exception, she knew nothing whatever of the matters mentioned in the bill, till some time in or about the month of *August*, 1849, when certain applications were made to her; and she insisted, that she ought not to be required to produce to the Plaintiffs any of the cases for the opinion of Counsel, or copies thereof respectively, mentioned in the schedule to the answer, the cases having been stated, and the opinions taken, either by the trustees or by her, in reference to the matters in question in the suit, and in anticipation of the pending proceedings, and with a view to their defence from such proceedings.

One of them, however, was dated in 1841, and all the others, except one, were before *August*, 1849.

Mr.

Mr. *Follett* and Mr. *Cairns*, contended that they ought to be produced, as they had been taken by the trustees, as such, and not in contemplation of litigation, and in fact could not have been intended by the administratrix to prepare for her defence, as they had been taken before the time she heard of the questions in the suit being raised.

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Mr. *Little*, *contra*, contended that the cases and opinions were privileged; *Brown v. Oakshott* (a); *Holmes v. Baddeley* (b). [*The Master of the Rolls*.—Do you put it so high as this:—that the trustee who has taken an opinion on the part of his *cestui que trust*, and then seeks to defeat his interest, must not be compelled to produce it, because it was taken in contemplation of litigation. I think all the cases and opinions taken by the original trustees must be produced; but as to their representatives the case is different, for they may have taken them to defend themselves.]

Mr. *Follett*, in reply. The Defendant says she never heard of the claim before *August*, 1849, and it is impossible that she previously prepared her defence to it.

*The MASTER of the ROLLS.*

I think all the cases and opinions must be produced, except the one taken in or since *August*, 1849.

(a) 12 *Beav.* 252. (b) 1 *Phill.* 476, reversing S. C. 6 *Beav.* 521.

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## RIDLEY v. TIPLADY.

Jan. 25, 27.

The Master having reported, under the provisions of the "Masters' in Chancery Abolition Act" (15 & 16 Vict. c. 80), that he was unable to proceed with an order of reference, by reason of the neglect of the parties to attend his summons, and the neglect having been occasioned by the solicitor of the Plaintiff, the Court directed the reference should be proceeded with in chambers; and, the client undertaking not to bring an action against the solicitor in respect of the conduct of the suit, it also ordered the solicitor to pay the costs of the Master's certificate, and of the subsequent proceedings.

**B**Y an order made on further directions, on the 14th of *July*, 1852, it was referred back to the Master to continue the account of what was due to the Plaintiff on the security of the deposit of the title deeds of certain premises, directed to be taken by the decree made on the original hearing, from the foot of his report dated the 24th of *May* then last; and it was ordered, that the Plaintiff's costs of suit should be taxed, that the premises should be sold, with the approbation of the Master, and that the purchase-money should be paid into Court.

In pursuance of this order of the 14th *July*, 1852, and of the 7th, 8th, and 9th sections of the Masters' in Chancery Abolition Act (15 & 16 Vict. c. 80), the Master made his report, dated the 13th of *December*, 1854, stating, that he had summoned the parties to attend him, to take his directions for the prosecution of the order of reference, and, for the reasons thereafter mentioned, he had thought fit to make his report; and he found, that the order was brought before him on the 2nd of November, 1852, for his directions as to its prosecution, but because of the non-attendance of the Defendant, it was allowed to stand over till the 9th of the same month, when the Defendant, who had then attended, was directed to bring into the Master's office all the deeds, &c., in his custody or power relating to the premises, but not having done so, the Master, at the request of the Plaintiff, by his certificate dated the 24th of *November*, 1852, certified the Defendant's default.

And

And he found, that on the 4th of *December*, 1852, the Defendant brought in the deeds, &c., and that on the 28th of *January*, 1853, the Plaintiff obtained leave to inspect them; but that neither party, though repeatedly summoned, had since attended him, and he was therefore unable further to prosecute the order.

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The Plaintiff had originally employed Mr. *Stainthorpe*, a country solicitor, whose town agent was Mr. *Wright*, but Mr. *Stainthorpe* having died in *December*, 1853, Mr. *Wright* had since acted as Plaintiff's solicitor in the suit.

During the years 1853 and 1854, both before and after the death of Mr. *Stainthorpe*, the Plaintiff frequently complained to Mr. *Wright* of the delay in the prosecution of the order, and Mr. *Wright* alleged various reasons by way of excuse. At one time, he alleged, that he had not received a satisfactory answer from Mr. *Stainthorpe*; at another, that he could not procure an appointment with the Master; and again, that the Master refused to order a sale of the property till a future time, when he considered it would realize a larger price; but he promised to expedite the business as much as possible. At last, on the 12th of *July*, 1854, the Plaintiff wrote to Mr. *Wright*, requesting an explanation of the delay, and expressing his determination to have the suit brought to a close, or to know why it could not be so brought; and having received no answer, he employed another solicitor, between whom and Mr. *Wright* several interviews took place in the months of *July*, *August*, *October* and *November*, but without any satisfactory result.

The Plaintiff then changed his solicitor, and now moved, that the account of what was due to him on the  
security

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security of the deposit of title deeds of the premises directed to be taken by the decree made on the original hearing from the foot of the Master's report, dated the 24th of *May* then last, might be continued, and that the premises might be sold, with the usual directions, and the purchase-money paid into Court, and that Mr. *Wright*, the former solicitor, might be directed to pay to the Plaintiff the costs occasioned by his neglect to carry on the suit, and of the Master's report, and of this application.

Mr. *Wright*, by his affidavit, stated, that his costs for conducting the suit, as agent of *Stainthorpe*, had not been paid.

Mr. *J. H. Palmer*, in support of the motion, cited *Walmsley v. Booth* (a).

Mr. *Cracknell*, for Mr. *Wright*, contended, that he was under no obligation to proceed with the suit, so long as his costs, as the agent of Mr. *Stainthorpe*, remained unpaid; and that on the employment by the Petitioner in *July*, 1854, of the new solicitor, Mr. *Wright* virtually ceased to be his solicitor.

The MASTER of the ROLLS was satisfied that there had been gross neglect on the part of the solicitor in proceeding with the suit, and that the explanations offered afforded no sufficient excuse for his conduct, which could not be permitted to operate to the prejudice of his client. He said he would consult the Judges of the other branches of the Court as to the order to be made upon that part of the motion which related to the prosecution of the order of the 14th of *July*, 1852, in chambers;  
 but

(a) 2 *Atkyns*, 27.

but in the meantime his opinion was, that the solicitor must pay the costs of the Master's report, and the subsequent proceedings thereon, together with those of this application, and the order to be made thereon.

1855.

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RIDLEY
v.
TIPLADY.

The MASTER of the ROLLS said he had not had time to consult the Judges, but he had seen the Master on the subject, and the result was, that he would direct a reference to chambers, and the order to be prosecuted there before the Chief Clerk. And the Plaintiff undertaking not to bring any action against his late solicitor, Mr. *Wright*, in respect of his conduct of the suit, Mr. *Wright* must pay to the Plaintiff, *John Ridley*, and the Defendants, *Robert Tiplady* and *James Robinson*, their costs of and incident to the Master's certificate, dated 13th of *December*, 1854, and also of this application.

Jan. 27.

SYMES v. MAGNAY.

IN 1841, Sir *William Magnay* effected an assurance on the life of *H. M.* He afterwards incumbered the policy, and notice was given to the insurance office.

H. M. died in 1853, and an action was brought in the name of Sir *William Magnay* against the insurance company, for recovery of the money due on the policy. The insurance company thereupon filed this bill of interpleader against the following parties:—First, Sir *William Magnay*; secondly, Messrs. *Overerd & Co.*,
who

Jan. 24.

The Plaintiff in an interpleader suit disallowed the costs of proceedings taken by him in the suit, subsequent to his receiving notice of the withdrawal of the adverse claims.

1855.

 SYMES
 v.
 MAGNAY.

who claimed as incumbrancers; thirdly, the administrator of *Rhys Jones*, who claimed as subsequent incumbrancer; and, fourthly, *Paddon* and his children, who set up a claim to the policy. After the institution of the suit, the sum was paid into Court, and the claim of *Overerd & Co.* was satisfied, and they were dismissed. *Paddon* and his children withdrew their claim, by notice to the office on the 16th of *June*, 1854, and the action, though in the name of *Magnay*, was for the benefit of the administrator of *Rhys Jones*. The Plaintiff nevertheless served *Paddon* with a *subpœna* to hear judgment, and brought the cause to a hearing. The cause came on upon a motion for a decree, and the only question was as to the costs.

Mr. *Roupell* and Mr. *Ferrers*, for the Plaintiff.

Mr. *Follett*, for *Paddon* and his children.

Mr. *R. Palmer*, for Sir *William Magnay*, and the administrator of *Rhys Jones*, argued, that there was no necessity for filing the bill, and that the proceedings ought not to have been continued after the adverse claims had been withdrawn.

Mr. *Roupell*, in reply.

The MASTER of the ROLLS.

In interpleader suits, the usual practice is for the Plaintiff to obtain the costs out of the fund, and the contest between the two Defendants is then put in a course of investigation, and the one in the wrong ultimately pays the costs. It is quite a modern practice to bring a bill of interpleader to a hearing.

I am

I am of opinion, that the Plaintiff ought not to have proceeded after he had notice that *Paddon* had abandoned his claim. I am at a loss to conceive why *Paddon* was served with a *subpœna* to hear judgment. I think the costs occasioned thereby must be paid by the Plaintiff. As to the other costs, an application ought to have been made by the Plaintiff to stay the proceedings, and I cannot allow him any costs incurred after notice of withdrawal of the adverse claims.

1855.

SYMES
v.
MAGNAY.

NOTE.—See *Sivell v. Abraham*, 8 Beav., 598. *The Sutton Harbour, &c. Company v. Hitchens*, 15 Beav. 161.

THOMPSON v. DREW.

Jan. 20.

ON the 24th of *December*, 1853, *Knowles*, being indebted to *Thompson* in the sum of 33*l.*, conveyed to him certain property. The deed contained a proviso, that if *Knowles* paid *Thompson* that sum by quarterly instalments of 5*l.*, the conveyance should be void; but if he made default, *Thompson* might, after three months' notice, sell and hold the proceeds, in trust, to pay himself the 33*l.*, and after payment thereof, in trust for *Knowles*. *Thompson* covenanted with *Knowles*, at any time before such sale should take place, on payment of 33*l.*, to reconvey the premises, and *Knowles* covenanted to pay the 33*l.*

A mortgage deed made no provision for interest, and the mortgagee thereby agreed, upon payment of the principal sum, to reconvey. Held, that the mortgage carried no interest.

It will be observed, that nothing was said in the deed as to interest on the 33*l.*

Default was made in payment, and this was a claim filed for foreclosure.

Mr. *R. Palmer* and Mr. *Moxon* asked for interest
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1855.

 THOMPSON
 v.
 DREW.

from the day of default. They cited *Farquhar v. Morris (a)*.

Mr. *Toulmin, contra*. No interest is reserved by the deed, and the mortgagee positively engages, on payment of 33*l.* only, to reconvey the property. No interest is therefore payable.

Mr. *Selwyn*, for another party.

The MASTER of the ROLLS.

I think this deed does not carry interest. There is an express contract to reconvey on payment of 33*l.*

(a) 7 Term Rep. 124.

CHILD v. CHILD.

Feb. 8, 17.

Trustees were empowered, with the consent of the wife, to lend the trust monies to the husband. The wife authorized an immediate loan of part, and of the remainder at such times as the husband might require, and the husband covenanted to pay it in six months. The

BY a settlement made in 1834, on the marriage of Mr. and Mrs. *Child*, certain funds were settled on the usual trusts, and power was thereby given to the trustees, with the consent in writing of Mrs. *Child*, "to lend the whole or any part of the trust monies," &c., at interest, payable half-yearly, after the rate of 4*l.* per centum per annum, at the least, unto Mr. *Child*, "upon his bills, bonds, notes, or other good and approved security."

In April, 1845, the trustees lent Mr. *Child* 1,550*l.*
 of

money was not called in, and was lost by the insolvency of the husband. Held, first, that the wife's consent could not be given prospectively; and, secondly, that the trustees were not bound to call in the money at the end of six months.

of the trust monies, and by a deed then executed, Mrs. Child consented to that loan to Mr. Child, and to the loan of the remaining trust monies, at such times and in such proportions as Mr. Child might require. Mr. Child thereby covenanted to repay the 1,550*l.* "at the expiration of six calendar months from the date on demand thereof." Further sums were afterwards advanced.

1855.
CHILD
v.
CHILD.

The money was not called in at the expiration of the six months, and it was lost by the insolvency of Mr. Child.

This bill, filed by Mrs. Child, sought to make the trustees responsible for the loss.

Mr. Lloyd and Mr. Baggallay, for the Plaintiff, argued, that the trustees had neglected their duty by not calling in the money at the end of six months, the interest not having been paid; secondly, that the trustees could not advance to the husband, on a prospective consent.

Mr. R. Palmer and Mr. C. Hall, for the trustees, argued that they were not bound to call in the money at the end of six months.

As to the liability of the trustees to the wife for the past income, the cases of *Caton v. Rideout* (a); *Buckridge v. Glasse* (b); *Beresford v. The Archbishop of Armagh* (c); *Howard v. Earl Digby* (d), were referred to.

Mr. J. H. Palmer, for Mr. Child.

Mr.

(a) 1 Mac. & Gor. 599.
(b) Craig & Ph. p. 137.

(c) 13 Sim. 643.
(d) 2 Clark & Fin. 634.

1855.

CHILD

v.

CHILD.

Mr. Lloyd, in reply.*The MASTER of the ROLLS* reserved judgment.

Feb. 17.

The MASTER of the ROLLS.

The only question, upon which it is necessary for me to give any decision, on the present occasion, is, what were the duties of the trustees with respect to the 1,550*l.*, and whether it was incumbent upon them to have called it in at the end of six months, and I am of opinion it was not.

I concur in the observations made by *Mr. Lloyd*, that this settlement, which allowed the money to be lent to the husband with the consent of the wife, did not thereby mean, that she might give a prospective consent to future loans to be thereafter made, but that her consent was necessary to each particular loan: still she was able to consent to a loan to the husband for an indefinite time, and, in order to support the proposition, that the trustees were bound to call in this fund at the end of six months, it must be established, that the wife consented only to a loan for that period.

It is very material to observe how the consent was given by this deed. It is given in respect of all future loans, and it is therefore obvious, that that consent, if it were valid, would have authorized the trustees, upon calling in the money at the end of six months, to have immediately lent it to the husband again. Now, though I am of opinion that her consent could not be given prospectively, still we may refer to the nature of the

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the consent for the purpose of ascertaining what was the character and extent of it, in regard to this particular loan; and I am of opinion, that it shews clearly, this was not a consent to a loan for six months only, but to a loan to the husband generally and indefinitely.

1855.


CHILD
v.
CHILD.

Fixing of a period of six months for payment is analogous to the ordinary case of fixing a period for the payment of money lent on mortgage, where six or twelve months is the period usually appointed for that purpose, and the estate becomes absolute at law if the money is not then repaid. I am of opinion, that this direction and covenant to pay at the end of six months meant nothing more, and that it would be a sort of trap to the trustees, if, upon a transaction of this description, it were to be held, that with the consent of the wife manifestly for a longer period, they were liable for not having called in the money at the end of six months, or, if I were to direct an inquiry, whether they could have effectually called it in, and make the liability of the trustees depend upon the result of that inquiry. Upon that point I am in favour of the Defendants.

1855.



EDMONDS v. MILLETT.

Feb. 9.

A testator gave to his son the option of purchasing an estate, at what to his trustees "should seem a fair and reasonable value." The trustees had a valuation made which amounted to 1,500*l.*, the valuation made at the instance of the parties interested in the produce exceeded that by one-third. Held, that the trustees having fixed what they considered "a fair and reasonable value," having authority to do so, it was incumbent on the Plaintiff to shew that it was fraudulent, in order to prevent the son's purchasing at 1,500*l.*

THE testator gave his real and personal estate to trustees, upon trust, as to his one-sixth share in freehold and leasehold in *Penpol*, and his share and interest in the manor of *Lelant* and *Trevethow*, "at some time within seven years after his decease," to offer to sell and convey the same unto his son, *Hannibal Curnow Millett*, "for such price or sum of money as to" his trustees "should seem a fair and reasonable value," if his son, *Hannibal Curnow Millett*, should, within twelve months after such offer, consent to purchase the same at such price or sum. And, in case he should refuse to purchase or neglect to accept the same, at such price and within twelve months, as aforesaid, then the trustees were to sell and hold the produce on certain trusts.

The testator died on the 13th of *January*, 1848, and the seven years would therefore expire on the 13th of *January*, 1855. The Plaintiff, being interested in the purchase-money, instituted this suit, stating that the trustees had not offered the property for sale as directed by the will, and praying for the administration of the real and personal estate. The cause having come on before the expiration of the seven years, it was ordered to stand over, to enable the trustees to give to the Defendant, *Hannibal Curnow Millett*, the option of purchasing the property.

The trustees had a valuation made of the property,
which

which amounted to 1,500*l.* The valuation on the other side amounted to 500*l.* more.

1855.

EDMONDS
v.
MILLETT.

Mr. *T. C. Thompson*, for the Plaintiff, asked that, as the valuations differed, another survey might be made or an umpire appointed.

Mr. *Follett* and Mr. *Smale*, for the trustees. It is notorious that valuers never agree, but the trustees have had a valuation made which is not impeached, and which they, in their discretion, consider "a fair and reasonable value," at which to offer the property to *H. C. Millett*.

Mr. *Roupell*, for *H. C. Millett*, asked a delay of a year to exercise his option of purchasing.

Mr. *Thompson*, in reply, asked for time to impeach the valuation.

The MASTER of the ROLLS.

I think that if the executors have fixed what they consider "a fair and reasonable value," having authority to do so, it is incumbent on the Plaintiff to shew it is fraudulent. I cannot give the Plaintiff any further opportunity to impeach it.

Declare that this is the offer which *H. C. Millett* is bound to accept or refuse, and direct the usual accounts.

1855.

Jan. 23, 24, 29.
Feb. 15.

CARRODUS v. SHARP.

In the absence of any express stipulation, the expenses and outgoings of property sold must be borne by the vendors, down to the time when the purchaser could prudently take possession, i. e. down to the time when a good title was shewn.

The validity of a leasehold title depended on the lessor's assent to the assignment. The assent was not given until after suit by vendor. Held, that the vendor must bear the rent, rates, taxes and outgoings, down to the date of the assent, and on the other hand, that the purchaser must pay interest from that time.

A purchaser, who had altogether denied the vendor's

right to a specific performance, ordered to pay the costs of suit, instituted by the vendor for that purpose down to the hearing, although the title was not finally completed until after the decree.

IN *August*, 1853, the Plaintiff, *Carrodus*, being entitled to the lease of a mill, called *Beckfort* Mill, agreed to assign it to the Defendant *Sharp*. The lease contained a covenant against assignment and underletting, without the consent of the lessor, which consent the Plaintiff undertook to obtain, and a covenant to keep the premises in repair. The contract also provided, that the machinery and effects should be valued by a person named and taken by the Plaintiff at that valuation. They were afterwards valued at 707*l*. Differences took place after long communications between the parties, and ultimately, in *November*, 1853, the Defendant having denied the Plaintiff's right to specific performance, the vendor, on the 30th of *November*, 1853, filed this claim for specific performance. A decree was made in *February*, 1854, when a reference was made as to title.

The principal point in contest was, when the lessor had given an unqualified assent to the assignment, and both the Chief Clerk and the Court came to the conclusion, on an examination of the evidence, that such assent had not been given until the 1st of *December*, 1854.

There was some evidence to shew, that a beam or some timbers which were old were decaying, and some flags on

on the pavement or floor seemed to be in an unsatisfactory state, but this was waived by the lessor.

1855.


CARRODUS
v.
SHARP.

The claim now came on for further consideration. The questions remaining to be decided related to the expenses and outgoings of the mill, the repairs and sustentation of the premises and machinery, the interest on the amount of the valuation of the machinery, &c. and the costs of the suit.

Mr. *Roupell* and Mr. *Amphlett*, for the Plaintiff.

Mr. *R. Palmer* and Mr. *J. V. Prior*, for the Defendant.

Mr. *Roupell*, in reply.

Long v. Collier (a); *Monro v. Taylor* (b); *Peers v. Sneyd* (c); *Harris v. Jones* (d); *Gutteridge v. Munyard* (e), were cited; and see *Sug. Concise View* (f); and *Robertson v. Skelton* (g).

The MASTER of the ROLLS postponed giving his judgment.

The MASTER of the ROLLS.

Jan. 29.

The questions remaining to be decided relate to the expenses and outgoings belonging to the mill, and to the

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| (a) 4 <i>Russ.</i> 269. | (c) 1 <i>Mood. & R.</i> 173; 7 <i>Car.</i> |
| (b) 8 <i>Hare</i> , 51; 3 <i>Mac. &</i> | <i>& P.</i> 129. |
| <i>Gor.</i> 713. | (f) <i>Page</i> 491; and <i>Dart</i> , 329. |
| (c) 17 <i>Beav.</i> 151. | (g) 12 <i>Beav.</i> 260. |
| (d) 1 <i>Mood. & R.</i> 173. | |

1855.


 CARRODUS

v.

SHARP.

the repairs and sustentation of the premises and the machinery there, and the costs of the suit.

They all, I think, in a great measure, depend on the same question, which is this:—from what time is the Defendant to be treated as the purchaser of the mill? In the absence of any express contract on the subject, the principle on which this question depends is this:—At what time could the purchaser, acting prudently, have taken possession of the premises sold? Up to that time the expenses and outgoings must be borne by the vendor, and from that time they fall upon the purchaser. Although this is not universally true, yet usually this inquiry is answered, by considering at what time a good title was first shewn, it being commonly clear that no purchaser can prudently take possession of what he has contracted to buy, until he is satisfied that he will be able to retain possession of it, or, in other words, until a good title is shewn. The first shewing of a good title, however, may depend on a slight circumstance, evidence of which could always have been furnished, if required, but which was not done, because some other matter, which was the real point of contest between the parties, and which has been ultimately decided against the purchaser.

In this case, my certificate shews, that a good title was first shewn on the 1st of *December*, 1854. I have read through the affidavits, and attended carefully to the arguments of Counsel, for the purpose of ascertaining whether the Defendant could prudently have taken possession of the premises before that time; and the solution of this question, in my opinion, depends on whether the lessor had assented to the assignment of the lease to the Defendant, for the lease to the Plaintiff contained a condition, that he was not to assign without the consent
in

in writing of the lessor. [His Honor examined the evidence minutely, and then stated the conclusion to which he had arrived as follows:]—I am of opinion, that no such assent was communicated to the Defendant, as would have enabled him to take possession of the mill, with a reasonable security that he would be able to continue in possession of it, until the 1st of *December*, 1854. In fact, I think that this question is concluded by the certificate, and that if it had been previously shewn to the Defendant that the lessor would have assented to a simple and unconditional assignment to him of the Plaintiff's lease, there being no question between the parties beyond this, a good title would have been shewn and the matter settled between the parties; subject, however, to some question respecting compensation for dilapidations.

The result is, that in my opinion, the Plaintiff will have to pay the outgoing incidental to the lease of the mill up to the 1st of *December*, 1854.

With respect to the dilapidations, it appears to me, upon the evidence, that some, though not a considerable, repair is required, for the purpose of putting the mill into tenantable repair, and to comply with what is required by the landlord; I refer to the evidence with regard to the beam in the mill and some flags on the pavement. On this part of the subject, I trust that the parties will have the good sense to come to an agreement as to the payment of a small sum, otherwise it must be ascertained by the Chief Clerk.

With respect to the machinery, I am of opinion that the Defendant must pay the 707*l.*, the amount of the valuation, but that he is not liable to pay any interest on that sum down to the 1st of *December*, 1854.

I am

1855.

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CARRODUS
v.
SHARP.

1855.

CARRODUS
v.
SHARP.

I am of opinion that the Defendant must pay the costs of the suit up to and including the hearing, as it was occasioned by his resisting a decree for specific performance, which, in my opinion, he was not entitled to do (a); but, since that period, the parties appear to me to have mutually claimed what they were not entitled to, and I shall therefore give no subsequent costs on either side.

There will therefore be a decree directing an assignment of the lease; the Defendant must pay the 707*l.*, with interest thereon from the 1st of *December*, 1854, together with the rent, rates and taxes, and other outgoings of the mill and machinery, and the preservation thereof, since the 1st of *December*, 1854. The Plaintiff will have to bear them down to that date, and must pay a sum to be arranged or ascertained in respect of the dilapidations of the mill. The Defendant must also pay the Plaintiff the costs of suit up to and including the first hearing.

(a) *Scoones v. Morrell*, 1 *Beav.* 251.

1854.



Dec. 14.

1855.

March 2.

GRIFFIN v. CLOWES.

BY indenture, dated the 10th of *May*, 1843, *Griffin* mortgaged some freeholds to the Defendants, *Alexander Davis*, *Emilia Davis*, and *Collingridge*, for securing 500*l*. This sum was part of monies, of which *Alexander Davis*, *Emilia Davis*, and *Collingridge* were trustees, and by the deed they were declared to be entitled thereto "on a joint account."

In 1849, *Collingridge*, who was a solicitor, had in his hands a sum of 500*l*. belonging to a client, the Defendant *Clowes*. *Collingridge*, without the knowledge of his co-trustees, gave notice to *Griffin* to pay off the mortgage, and he prepared a transfer thereof to *Clowes*.

By this deed, dated the 27th of *June*, 1849, in consideration of a sum of 500*l*. therein stated to be paid by *Clowes* to *Alexander Davis*, *Emilia Davis*, and *Collingridge*, they purported to convey, and *Griffin* confirmed, the property to *Clowes*, subject to a new proviso for redemption, on payment of 500*l*. and interest, and *Griffin* covenanted, in the usual form, to pay that sum.

This deed, being executed by *Griffin* and by *Collingridge*, *Collingridge*, in *August*, 1850, representing the money was about to be paid off, obtained the signature of *Emilia Davis* to this deed, but *Alexander Davis* refused to execute it until payment and reinvestment of the 500*l*., and it was never executed by him. A receipt for 500*l*. was indorsed on this deed, which was signed

by

A. mortgaged property to three trustees, *B.*, *C.* and *D.* Some time after, *B.*, who was a solicitor, having in his hands a sum belonging to a client, *E.*, proposed to lay it out on a transfer of the mortgage. He prepared a transfer, which was executed by *A.*, *B.* and *C.*, but not by *D.*, and a receipt for the money was signed by *B.* and *C.* alone. No money was ever paid, and it was lost by *B.*'s insolvency. Held, that the alleged transfer to *E.* was ineffectual, the consideration not having actually been paid, and that, in equity, the deed was inoperative both as against the mortgagor and the three trustees.

1854.

 GRIFFIN
 v.
 CLOWES.

by *Collingridge* and *Emilia Davis* only. *Collingridge* never paid over any part of the 500*l.*, and it was lost by his insolvency. The deeds, thus imperfect, were handed over by him to *Clowes*, who received interest on the mortgage down to *December*, 1851.

In *September*, 1853, *Griffin* filed this bill against *Clowes* and the three trustees, stating the difficulties in obtaining a reconveyance, and praying to redeem, on payment of what was due on the indenture of 1849, and to restrain the Defendants from proceedings at law to recover the money. *Collingridge* had gone out of the jurisdiction.


By the decree an account was directed of what, if anything, was due to the Defendants, or any or either of them, on the security of the indentures of 1843 and 1849, or either of them.

The Chief Clerk certified, that 500*l.* was due to the Defendants *Alexander Davis*, *Emilia Davis*, and *Charles Collingridge*, on a joint account, on the security of the deed of 1845, with interest from *December*, 1851.

Dec. 14. A motion was now made by *Clowes*, that the certificate might be varied, by introducing a statement that the 500*l.* and interest were due to *Clowes* on the deed of 1849.

Mr. *Roupell* and Mr. *Hemming*, in support of the motion, argued, that in these transactions *Collingridge* was the solicitor of the trustees as well as of *Clowes*, and that he had full authority to act for them in the matter; that *Alexander Davis* was bound to execute the deed of 1849, because having authorized *Collingridge* to act for him, his receipt therefore bound him. Here
there

there was the receipt for the money not only of *Collingridge*, but of *Emil a Davis*, which evidenced the passing of the consideration ; and that payment to one of several joint tenants was a valid payment ; for it was not necessary, even at law, to allege an authority for one out of three joint tenants to receive a joint demand ; *Wallace v. Kelsall (a)*.

1854.

 GRIFFIN
 v.
 CLOWES.

They argued, further, that the possession of the deed by *Collingridge* authorized his receipt of the money ; *Sir John Wolstenholm v. Davies (b)* ; *Abbingdon v. Orme (c)*. That the deed of 1849 was not a transfer but a new mortgage deed, and that by the bill itself the Plaintiff offered to pay what was due on that deed of 1849. That *Clowes*, who was a purchaser for valuable consideration, could not be compelled to part with the title deeds, or to reconvey the property until he had received payment of what he had advanced. They argued also, that the other side were bound by laches, negligence and acquiescence.

The MASTER of the ROLLS, in substance, said, that there had been no payment of the 500*l.* to *Collingridge*, on behalf of the trustees, but a mere retainer in his hands of so much of *Clowes's* money. That *Collingridge* had executed and had got *Emilia Davis* to execute the deed, but that *Alexander Davis* had refused to do so until payment. That it appeared to him, therefore, to have remained an *escrow* in the hands of *Collingridge*, *Clowes's* agent ; and that, although it was hard upon *Clowes*, still he must be the loser, in consequence of the acts of his agent.

Confirm

(a) 7 *Mec. & Wels.* 264.
 (b) *Freeman's C. C.* 289.

(c) 1 *Eq. Ca. Ab.* 145.

1854.

GRIFFIN

v.

CLOWES.

Confirm the certificate, and refuse the motion with costs.

1855.

March 2.

The cause now came on for further directions and as to costs.

Mr. *R. Palmer* and Mr. *T. H. Terrell*, for the Plaintiff, asked for the usual decree for redemption, on payment of the 500*l.* and interest to the three trustees; for the delivery up of *Clowes's* mortgage to be cancelled; for an injunction against proceedings at law on it; and that *Clowes* might pay the costs of suit. They cited *Young v. White* (a); *Young v. Guy* (b).

Mr. *Roupell* and Mr. *Hemming*, for *Clowes*, in addition to the former argument, added, that the bill did not ask for the cancellation of the deed of 1849, but treated it as valid, and sought relief in respect of one only of the two deeds and debts. That the covenant of *Griffin*, in the second deed, was valid, though not executed by the covenantees; *Soprani v. Skurro* (c); that the deed ought not to be delivered up or cancelled, nor ought the covenantee to be restrained from enforcing his legal remedies.

Mr. *Lloyd* and Mr. *Shebbeare*, for *Alexander* and *Emilia Davis*.

Mr. *A. H. Welch*, for another party.

The MASTER of the ROLLS.

I am of opinion, that I must give effect to my decision upon the motion to vary the certificate, which I have

(a) 7 *Beav.* 506. (b) 8 *Beav.* 147. (c) *Yelverton*, 18.

have confirmed, and the only question is, in what mode ought that to be done? I think that the Counsel for Mr. *Clowes* do not adopt the view I then took, when they speak of two debts. I am of opinion, that in this case, there are not two debts.

1855.

GRIPPIN
v.
CLOWES.

I must treat the case thus:—as if the owner of an estate had executed and delivered to Mr. *Clowes*, a deed similar to that of 1849, in consideration of 500*l.*, expressed to have been paid by Mr. *Clowes*, and that he had never paid the money. My decision, in point of fact, is, that he never did pay the money,—that he had intrusted money, some time before, to Mr. *Collinridge*, and expected he would pay it over, but that, in fact, Mr. *Collinridge* never did pay it; so that Mr. *Clowes* has never paid the money, and it never came to the hands of the persons to whom he intended it to be paid. Consequently, it must be looked at in the same way as if a mortgagor had executed a mortgage deed in favour of a mortgagee for 500*l.*, with the usual covenant to pay, and had delivered the deed to him, but the mortgagee having got possession of the deed, had, in fact, never paid the money.

It is true there is this distinction, that the case supposed could scarcely have occurred without some suspicion of fraud on the part of the mortgagee, and that there is no fraud of any sort existing in this case, except that committed by *Collinridge*.

The question really is, which of the innocent parties is to bear the loss? and I apprehend, that, in the case I have stated, the equity would be very clear, and that this Court would not allow the mortgagee, who had not paid the money, to bring an action on the covenant, because he would recover at law, for the covenantor

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could not raise the question, whether the consideration money had, or not, been paid ; the deed would be conclusive evidence upon that subject, in a Court of Law. But it is clear that in equity, if no money had been paid, this Court would not allow the covenantee to sue the covenantor for the amount, nor would it allow him to retain the legal estate conveyed to him by a deed, the foundation and validity of which would here depend upon payment of a sum of money, and which had not been paid.

I think, therefore, after some hesitation upon the subject, in the course of the argument, that the form of the relief asked by the prayer is correct, and that there ought to be an injunction against suing upon the covenant, and a reconveyance of the estate by both Defendants. That will render the delivery up of the deed unnecessary.

Mr. *Clowes* must pay the costs of suit.

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March 10, 12.

April 21.

THE testator, *William Webb*, having invested monies of his own in the joint names of himself and his wife, *Sarah Webb*, in the purchase of 3l. per Cent. Consolidated Bank Annuities, amounting in the whole to 2,655l. 5s. 1d., made his will on the 18th of August, 1832, and he thereby gave two freehold houses in *Arthur Street, Middlesex*, to his wife, for her separate use, for life, and after her decease, to his daughter *Mary Worthington*, then the wife of the Plaintiff, *Thomas Worthington*, for life, for her separate use, and after her decease, to her children; but if his daughter should die without leaving issue of her body her surviving, and if the Plaintiff should survive her, then he gave the two houses to the Plaintiff in fee.

To constitute a settled and concluded election, there must be, first, clear proof that the person was aware of the nature and extent of his rights; and secondly, that having that knowledge, he intended to elect.

A testator, having invested a sum of money in stock in the joint names of himself and his wife, gave his freehold and leasehold estates, and the specific stock to her for life, with remainders over, and he appointed her his sole executrix and residuary legatee. The wife, after

The testator next bequeathed several leasehold houses, in *Howard's Green* and *Devonshire Street, Middlesex*, to his wife, for life, and proceeded thus:—"I also give and bequeath unto my said dear wife, *Sarah Webb*, all my stock and monies in the funds, now consisting of 2,655l. 5s. 1d., 3l. per Cent. Consolidated Bank Annuities, and all and every other such sum and sums of money, in the same or any other funds, as I may be possessed

her husband's death, had the stock transferred into her own name, and did not include it in the estimate for the purposes of probate. She recovered debts as executrix, occupied one of the houses, and enjoyed the rents of the estates, and on her second marriage, she transferred the stock into the names of herself and of another person, in trust for herself for life for her separate use, and then as she should appoint by will. She died sixteen years after the testator, and it was found by the Master, that it would have been greatly to her disadvantage to have elected to take under the will. Held, nevertheless, that she had elected so to take.

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of at the time of my decease, my said dear wife, *Sarah Webb*, to receive and take the interest and dividends thereof, from time to time, to and for her own sole and separate use and benefit, for and during the term of her natural life. And from and after the decease of my said dear wife, *Sarah Webb*, then I give, devise and bequeath all and singular my said leasehold messuages or tenements, situate in *Howard's Green* and *Devonshire Street* aforesaid, and all my stocks, funds and securities, as aforesaid, and the rents, profits and interest thereof, in the same manner, and for the same ends, intents and purposes, and to be sold and disposed of as my said two freehold messuages or tenements in *Arthur Street* aforesaid, to and for the use and benefit of my daughter, *Mary Worthington*, her husband, *Thomas Worthington*, and their child and children as aforesaid. I give and bequeath all the rest, residue and remainder of my estate and effects whatsoever and wheresoever, and of what nature or kind soever, unto my said wife, *Sarah Webb*."


The testator appointed his wife sole executrix of his will.

The testator, after the date of his will, invested a further sum of his own in the purchase of 50*l.* 3*l.* per Cent. Consolidated Bank Annuities, in the joint names of himself and his wife, making in all 2,705*l.* 5*s.* 1*d.*; and he died on the 26th of *November*, 1832.

Mrs. *Webb*, the widow, proved the will, in *March*, 1833, and, in the *June* following, she transferred the stock standing in the joint names of the testator and herself into her own name, and, by purchases in her own name, previously to *August*, 1843, she increased the stock to the sum of 3,395*l.*

Mrs.

Mrs. *Webb* did not, for the purposes of probate, include the 2,705*l.* 5*s.* 1*d.* stock in her estimate of the testator's personal estate, which was sworn by her to be under 500*l.*

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In the year 1833, Mrs. *Webb* recovered, in an action against a debtor to the testator's estate, the sum of 174*l.*; and for a year after the testator's death she received the rents of the leasehold houses; but having received notice to repair five of them, situate in *Howard's Green*, she gave them up to the landlord in consideration of a sum of 12*l.* paid by him. One of the two other leasehold houses, which were situate in *Devonshire Street*, had been occupied by the testator, and the widow continued to reside in it after his decease, during the whole of her life, and she used the furniture it contained for the purpose of her occupation. She received the rents of the other leasehold house, and also of the two freehold houses, out of which, however, she was entitled to dower.

On the 16th of *November*, 1836, *Mary Worthington*, the daughter, died without leaving issue; and, in 1838, the Plaintiff, at Mrs. *Webb's* request, went to reside with her, and continued to do so till some time in the year 1843.

On the 21st of *August*, 1843, the day before her marriage with *Abraham Shearing*, Mrs. *Webb* transferred the 3,395*l.* stock into the joint names of herself and *Edmund Ephraim Wiginton*, and on the 22nd of the same month, a memorandum of agreement was signed by her and *Shearing*, whereby it was agreed, that all the property belonging, or thereafter to belong, to Mrs. *Webb*, should be settled upon her for life, for her sole
 and

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and separate use, and after her decease, it was to be disposed of as she, by will or otherwise, notwithstanding coverture, should direct.

By her will, dated the 5th of *October*, 1847, Mrs. *Shearing* gave a watch to Mrs. *Wiginton*, and all the residue of her property, over which she had any disposing power, to *Edmund E. Wiginton*, in trust, to pay thereout an annuity of 40*l.* to her husband, so long as he remained unmarried, and, subject thereto, for the sole use of *E. E. Wiginton*; and she appointed him and his son, *E. W. Wiginton*, her executors.

The testatrix died on the 5th of *March*, 1848, having resided in the house No. 41, *Devonshire Street*, up to her decease, and having received the rents of the house No. 42, in the same street, and of the freehold houses, and the dividends on the stock. Her will was proved on the 27th of *March*, 1848, her property being sworn under 100*l.*, and, on the day before, *E. E. Wiginton* died, having by his will appointed his wife and his son, *E. W. Wiginton*, his executors.

Under these circumstances, the question was, whether the testatrix, Mrs. *Shearing*, had elected to take under the will of her first husband, and whether her representatives might not now elect to take adversely to that will?

The Master had found, that Mrs. *Shearing* did not elect to take under the will, and that it would have been greatly to her disadvantage to have elected to take under the will. The Plaintiff excepted to that finding.

Mr. *R. Palmer* and Mr. *Lambert*, in support of the exception. The wife was appointed executrix and sole trustee of the will, and the question is, did she accept
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the trusts of it? By proving the will, she so far certainly accepted the trusts, and the acts done by her afterwards were by no means equivocal, they were clearly in accordance with and in adoption of the dispositions made by the will. In the first place, it is to be observed, the property had belonged to the husband, and therefore many moral and reasonable considerations, not involving a legal, but an imperfect moral obligation existed, which would make it natural for the wife to confirm the will of her husband, and therefore, negatively, it is highly probable that she intended to confirm it. But there are positive acts of the widow. She proved the will, and the consequence is, she knew two things; first, the value of all that her husband had disposed of by his will, and all the benefits she could take under it. As to this there was no uncertainty, for the property is sworn by her to be under 500*l*. Secondly, she knew that the stock legally survived to herself, and did not pass under her husband's will (*a*), and accordingly, she did not include it in the estimate of the testator's property, made for the purposes of probate, and it was not subject to legacy or probate duty, though given up or brought into the testator's property, under the doctrine of election; *Laurie v. Clutton* (*b*). Knowing all this, the widow continued to deal with the property during her widowhood, as if under the provisions of the will. She transferred the stock into her sole name, allowed it to remain, and received and applied to her own use both the dividends of it and the rents of the freeholds and leaseholds. Again, after her marriage, she appropriated to herself the whole income of her husband's real and personal estate. What greater evidence could there be of an intention to give effect to the

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(*a*) *Dummer v. Pitcher*, 2 *Myl.*
 & *K.* 262.

(*b*) 15 *Beav.* 131.

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the will? She must, therefore, according to all the cases on the subject, be considered as having elected to take under the will. The cases, indeed, show, that election may be kept suspended while there is uncertainty as to the situation of the property, or the benefit or advantage to be derived from the exercise of the right to elect, or where the party thinks himself not bound to elect. The cases are all to be found in 2 *Rop. Leg.* (a), and it may be sufficient to refer to *Tucker v. Sanger* (b); *Butricke v. Broadhurst* (c); *Whistler v. Webster* (d); *Wake v. Wake* (e). Her conduct is consistent with her title under the will, and altogether inconsistent with electing to take against it; *Archer v. Pope* (f); *Tomkyns v. Ladbroke* (g); *Harvey v. Ashley* (h); *Pawlett v. Delaval* (i); *Duke of Northumberland v. Aylesford* (k); *Duke of Northumberland v. Egremont* (l); *Stratford v. Powell* (m); *Giddings v. Giddings* (n). On the whole, it is submitted that the Master is wrong upon this point.

Mr. Roupell and Mr. Archibald Smith, for the Defendant *Wiginton*, contended, that the widow not only had made no election, but had shown by her dealings with the stock that she considered it to be her own, and that she meant to deal with it as such. And as to her entering into possession of the testator's real and personal estate, she did so in her character of executrix, and in right of her dower. That on a question of intention the maxim of *ignorantia legis non excusat* was inapplicable.

(a) Pages 1652 — 1655, &c. (*White's* edit.).

(b) *McClell.* 439; 13 *Price*, 607.

(c) 1 *Ves. jun.* 171; 3 *Bro. C. C.* 88.

(d) 2 *Ves. jun.* 367.

(e) 1 *Ves. jun.* 335.

(f) 2 *Ves. sen.* 523.

(g) 2 *Ves. sen.* 592, 593.

(h) 3 *Atk.* 615.

(i) 2 *Ves. sen.* 670.

(k) *Ambl.* 540; *S. C. nom.* Earl of Northumberland v. Marquis of Granby, 1 *Eden*, 498.

(l) *Ambl.* 657.

(m) 1 *Ball & B.* 24.

(n) 3 *Russ.* 241.

inapplicable. They commented on *Wake v. Wake* (a); *Butricke v. Broadhurst* (b); and cited *Dillon v. Parker* (c); *Brice v. Brice* (d); *Edwards v. Morgan* (e); *Padbury v. Clark* (f).

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Mr. *Hobhouse*, for *George Gray*, the administrator *ad litem* of Mrs. *Shearing*.

Mr. *R. Palmer*, in reply.

The MASTER of the ROLLS.

I will look at the authorities before I decide; but with reference to the argument, that this lady was not cognizant of her rights, and had no knowledge of the law, I will now state, that every one is assumed to know, that if he takes under a will, he must give full effect to it, and that he cannot be allowed to adopt that part of it which is for his advantage, and reject that which is not; but whether the person taking under the will knew he had an interest adverse to it, is a question of fact, resting on evidence. I will look into the cases.

The MASTER of the ROLLS.

April 21.

This is an exception taken to the Master's report, finding that Mrs. *Shearing*, the widow of the testator *Webb*, did not elect to take under his will. The facts which

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| (a) 1 <i>Ves. jun.</i> 335. | (d) 2 <i>Moll.</i> 21. |
| (b) 1 <i>Ves. jun.</i> 171; 3 <i>Bro.</i> | (e) 1 <i>M'Clel.</i> 541; 13 <i>Price</i> , |
| <i>C. C.</i> 88. | 782; 1 <i>Bli. (N.S.)</i> 401. |
| (c) 1 <i>Swanst.</i> 359; 1 <i>Wils.</i> | (f) 2 <i>Macn. & G.</i> 298; 2 <i>H.</i> |
| 253; <i>Jac.</i> 505; 1 <i>Cl. & Fin.</i> | & <i>Tw.</i> 341. |
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which raise the question are as follow. [*His Honor stated them.*]

The question is, whether, in this state of things, the testatrix, Mrs. *Shearing*, the widow of the testator, can be held to have elected to take under the will of her first husband, and whether her representative may not now elect to take adversely to the will of the original testator?

That election may be inferred from the circumstances, and from the acts of the persons bound to elect, is not an open question. The burden of proof, however, lies, in this case, on the Plaintiff, who asserts that she did so elect, inasmuch as it was manifestly for her own personal pecuniary advantage to take adversely to the will, by which she would have had the absolute interest in the whole of the stock, and would have enjoyed one-third of the rents of the freehold houses during her life.

Two things are essential to constitute a settled and concluded election, by any person who takes an interest under a will, which disposes of property belonging to that person. There must be, in the first place, clear proof that the person put to his election was aware of the nature and extent of his rights; and, in the second place, it must be shown that, having that knowledge, he intended to elect.

In this case, I think that the widow was aware of what her rights were; she was fully aware of the contents of her husband's will; she was the sole executrix named in it and had proved it; and she made use of her character

character of executrix to enforce payment of money due to her late husband, and to arrange with the landlord for the surrender of the five leaseholds. She must, therefore, on the one hand, have known, that her husband had, by his will, specifically bequeathed the stock standing in their joint names, and that by it, he gave her only a life interest in that stock. By using the word "specifically," I do not mean to make any distinction between a specific or pecuniary bequest, but I should have said specially and particularly bequeathed that stock. She knew that he had disposed of it, and had given her but a qualified interest in it.

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On the other hand, I think that it is established by the evidence, that she knew that the testator, having died before her, had no power to dispose of that stock ; but that it belonged absolutely to herself. She does not include it in the estimate of his personal estate made for the purposes of probate, and she must, therefore, have known that it did not form part of his estate, but that, on his death, she became the absolute owner of the stock standing in their joint names. I think that these circumstances constitute or prove a knowledge, on her part, that she was bound to elect. She knew that the will disposed of her property, she knew that she could withdraw it from the operation of the will, and I think that she must be taken to have known, that if she did so withdraw it, she was, by law, bound to make good to the other legatees and devisees their loss, out of what she would otherwise have taken under the will. Unless this be so, there never could be a case of an election completed by the acts of the parties.

The next question is, did she intend to give effect to the will, or did she intend to take adversely to it. On the

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the part of the Plaintiff it is contended, that her receipt of all the rents, her possession of the furniture, her recovery of the debts and retention of the money so recovered, and her continued residence in the house of the testator, are all together conclusive evidence of her intention to give effect to the will; for if she intended to act otherwise, that money and the rents for four years ought to have been invested by her, to make good to the Plaintiff, his wife and children, the amount that they would lose by her taking adversely to the will, and this is confirmed by the circumstance, that on the death without issue of the wife of the Plaintiff, in the year 1836, she continued to receive and apply for her own use the rents, instead of paying them, together with the capital of the residue of the testator's estates to the Plaintiff, who, if she did not give effect to the will, had become entitled to them. On the other hand, the fact that she took possession of the consols, by transferring them into her own name, her adding to them by subsequent purchases on her own account, all mixed up in one fund, the agreement on her second marriage and the terms of her will, which are wholly silent as to any interest in any person other than herself, are urged as evidence that, if any election at all is to be inferred, it must be presumed that she elected to take adversely to the provisions of the will.

Upon the whole, I think, that the acts of the widow are only referable to, and explainable by an intention to give effect to the will and to take under it. The case of *Edwards v. Morgan* (a), which was principally relied upon for the Defendants, seems to me to be distinguishable from the present, in a most important particular, and this particular is, the knowledge of the nature and extent

(a) *McClel.* 541; 13 *Price*, 782; 1 *Bli.* (N. S.) 401.

extent of her rights possessed by the person sought to be fixed with the election.

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Edwards v. Morgan is a case of very high authority ; it was decided by a Judge thoroughly familiar with the doctrines of a Court of Equity, and his decision was affirmed by the House of Lords. The case was this :— On the marriage of a man with his wife, leasehold estate had been settled on the husband and wife, for their joint lives, with remainder to the survivor. The husband died first. By his will he bequeathed that leasehold estate to his wife, for her life, and, after her decease, to her three daughters, in the following manner :—viz., to *Margaret*, for life, remainder to *Bridget*, for life, remainder to *Elizabeth*, for the residue of the term ; and he made his wife his residuary legatee and the sole executrix of his will. The widow, on his death, proved his will and remained in possession of the leasehold estate for fourteen years, when she died. She, by her will, gave the residue of her personalty to *Margaret*, and made her her executrix, but she did not dispose, by name, of these leaseholds. *Margaret* and her husband remained in possession of the leaseholds for seventeen years, when *Margaret* died, and thereupon *Bridget* and her husband entered into possession of them. After ten years the husband of *Margaret*, who was also her legal personal representative, claimed the leaseholds, and filed a bill to recover them and to have an account of the rents and profits. This was met by a cross bill, alleging that the widow of the testator had elected to take under his will, and that the residue, which was more than sufficient to pay the debts, was the benefit she took, and which she ought to have surrendered, and would have surrendered unless she had elected to take only a life interest in the leaseholds. There was no evidence, in that case, that the widow knew

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knew of her absolute right to the leaseholds, as there is here, that she knew of her absolute right to the stock; besides this, there was no evidence of her having done any act whatever inconsistent with her right of taking the leaseholds absolutely. The rents she was entitled to, in either event, whether she took under the will or against it, which is equivalent to the dividends of the stock in the present case; the residue she necessarily took as executrix, even if she took adversely to the will;—but whether there was any beneficial interest in this residue does not appear, the amount of it was wholly unascertained beyond this:—that it was more than sufficient to pay the debts.

In this state of things, the observations of Chief Baron *Alexander* are conclusive, which I will read (a). “Now through all my life I have had an impression, which has been confirmed by an examination of precedents on this occasion, that whether parties were bound to elect, or not, was one question, and whether they had made an election, another; and that a Court can never hold persons to have made an election, without fully understanding that they were cognizant of the nature of the rights between which they were to choose, and of the claim upon them to elect, and that, in consequence of that knowledge, they did actually elect. But I have the most thorough conviction, both from the will of the husband, and from the conduct of this lady, that she had not the most distant conception that she was called upon to make an election, and that is the construction I put on all the testimony which the adverse parties have produced. If she had meant to make an election, she was not bound to do anything at the time of her husband’s death, with respect to these estates, but what she

(a) *M’Clel.* 551.

she did do. She was entitled to the possession of the leasehold estates, whichever way she might elect. She might have been called upon to give security, I apprehend, but nothing more, because the ultimate interest of these Defendants was totally uncertain. One cannot tell whether the eldest daughter, *Margaret*, might not have outlived the whole term; it would have been an extraordinary, but it was a possible, event; and taking that into consideration, what value could be set on the reversionary interests? There were only two acts possible to be done by Mrs. *Thomas*, which would have testified an election on the subject; the one was the settling this estate to the uses of her husband's will, which act would have been evidence of an election one way; the other was the making some provision for the possible and future interest of those persons who were to be disappointed of their benefit under the husband's will, which would have proved a determination the other way. But she does neither the one nor the other, and upon what principle I can be asked to hold, that this lady, in my opinion, clearly not cognizant of what her rights were, or that she was bound to elect at all,—upon what principle I can be asked to hold, that she did actually make an election, I own after having weighed to the utmost of my power all the arguments that have been used, I am utterly unable to discover."

But the case suggested would have been very different, if, upon her husband's decease, she had sworn to an instrument which, in effect, asserted that the leaseholds belonged to herself and not to her husband, and if, in addition to doing this, she had received the rents of other property which she could only have taken as a devisee under the will of the testator.

Here the acts of the widow, in receiving the dividends
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of the stock, amount to nothing; she was entitled to them in either event, as the widow in *Edwards v. Morgan* was to the rents of the leaseholds, but in the case before me, the acts of the widow, in receiving and appropriating the whole of the rents of the two freehold houses, after her husband's death, appear to me to be referrible only to her desire to take the interests given to her by his will, and to carry into effect the provisions of it. As it was for the benefit of her daughter and her issue that she should do so, this seems to me to afford a reasonable answer to the objections, that by so doing, she sacrificed the great advantages she might have had, looking at her own interests exclusively, if she had taken adversely to the will. Her acts, with reference to the stock, seem to me to be equivocal. The additional purchases made were partly from the property of the testator and partly from her own property. She was the sole trustee, but, unless she had appointed new trustees, or had purchased a different species of stock, she could not have kept them distinct.

The cases relative to widow's dower have no application to the present.

The case of *Dillon v. Parker* (a) is one of considerable complication, but it does not appear to me to militate against the view I take of this case. It was decided by that case, that the exercise of a power equivocal and referrible to either right, does not amount to an election, and an expression much relied upon, in that case, "that Sir *Henry* had elected to take both estates," applies to the peculiar circumstances of that case, but does not appear to me to have been used as having a general application to all cases, which, if it did, and it were followed, would produce this result:—that no election

(a) 1 *Swanst.* 359; 1 *Wils. C. C.* 253; *Juc.* 505; 5 *Cl. & F.* 303.

election short of actual declaration of election could ever exist.

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In *Padbury v. Clark* (a), the only act which could be referred to as constituting an election determined, was this:—*Mary Cox Clark* was said to have elected to take under the will; she was a Defendant; she denied ever having elected or intended to elect; she never had been in possession of the rents of the leasehold house, which was the only interest she took under the testator's will, but her father, who was her guardian, had received and had applied those rents for her benefit, during her minority, and the lease having expired during her minority, when she attained twenty-one, she received from her father 49*l.*, being the balance of the rents received by him, and not applied for her maintenance. The Court determined that a case of election arose, and that *Mary Cox Clark* was bound to elect, and that if she elected to take against the will, she must account for the rents of the leasehold house, received by her father, and applied for her benefit, but that the receipt of the 49*l.* did not conclude her, or amount to an election made and determined by her, although the Vice-Chancellor of *England* had been of opinion that it did. It is needless to observe how different that case is from the present. In *Brice v. Brice* (b), the facts are very slightly stated, but so far from there being, in that case, evidence of the person said to have elected having had any knowledge of his rights, the case states, that there was some evidence that he was ignorant of the settlement which created them, in opposition to his interest under the will.

In *Ardesoife v. Bennet* (c), a legacy had been given to

(a) 2 *Macn. & G.* 298; 2 *H. & Tw.* 341.

(b) 2 *Moll.* 21.

(c) 2 *Dick.* 463.

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to a married woman, for her separate use ; she was the heir of the testator, who had disposed of copyholds not surrendered to the use of the will ; it was held, that her receipt of the interest of that legacy, for many years, constituted an election to take under the will, and not against it. *Paulet v. Delaval* (a) ; *Archer v. Pope* (b) ; *Tomkyns v. Ladbrooke* (c) ; and the Earl of *Northumberland v. Marquis of Granby* (d), to which cases I was referred, all support this view of the case. In *Butricke v. Broudhurst* (e), the widow having taken possession of the property devised, and having retained it for five years, was not allowed afterwards to elect to take against the will, and claim a sum thereby disposed of, to which she was entitled under her marriage settlement.

I think it unnecessary to go through a greater number of the cases, most of which I have consulted. The question, whether election has or has not been made by the person bound to elect, must usually depend on the facts of each particular case.

In this case, I rely, principally, on the fact of the receipt of the rents of the freehold houses, to which, except under the will, the widow was not entitled, and that she continued so to receive them during her whole life. The circumstance that no claim was made by the Plaintiff until after her death, so far from prejudicing his case, seems to me to assist it. Until her death he had every reason to believe that it would never be necessary to make any claim. Her acts and conduct would reasonably have induced him to believe, that she had resolved to give effect to the will, and that she was acting

(a) 2 *Ves.* 668.
 (b) 2 *Ves.* 525.
 (c) 2 *Ves.* 593.

(d) 1 *Eden*, 493.
 (e) 1 *Ves. jun.* 171.

acting in that view. Had he thought otherwise, it is impossible to understand why he should not, on the death of his wife, have called upon the widow to put him in possession of the houses and of the residue of the testator's estate, and if she intended to take against the will, it was her duty so to have acted at that time, without being applied to. He had every reason to believe the matter concluded; and if so, he could not interfere with her possession of the whole property, which she was entitled to retain during her life. But, in fact, my belief is, after a full consideration of the circumstances, that the widow never intended to dispute the will of the testator, or to claim adversely to it. Her omission to include the stock in the probate was merely to avoid the duty, and thus carrying into effect what, no doubt, was the intention of the testator, when he transferred the stock into the joint names of himself and his wife. Her transfer of the stock into the name of another person, on her second marriage, was necessary, so far as regards the amount intended to be disposed of by the testator, in order to prevent her second husband from having dominion over it; her other acts, and the general course of her conduct, lead me to the conclusion I have arrived at, that if she had been, within a year after the testator's decease, called upon categorically by the Court or otherwise to elect to take under the will or against it, she would have stated the determination she had come to, to take under the will. By doing so, she increased her own life income, unless she spent the capital of the stock in the purchase of an annuity, and thus diminished the portion she expected to leave to her daughter. All her acts, which are not to some extent equivocal, seem to me to point to the same conclusion. Her will appears to me to be one of the acts which, though strongly relied upon for the Defendants, is far from being conclusive. She had pro-

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perty on which the will might operate, without dealing with the stock existing at the death of the testator, and no expression is to be found in her will, which shows any intention to dispose of that stock contrary to the direction contained in the will of her husband.

The result is, that after giving to this case the best consideration I can, I have the misfortune to differ from the Master, and I think that the exception must be allowed.

NOTE.—An appeal was opened before the Lords Justices, but the case was afterwards arranged between the parties personally.

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 June 5.

JEBB v. TUGWELL.

A testator gave "all his property, both real and personal," to his wife for life, and he authorized her, with the consent of his executors, to sell or exchange "any part of his property." After her death, he gave "all his property, both real and personal," to his daughters,

THE question in this cause arose upon the construction of the will of a testator, and the validity and effect of certain deeds, executed under powers, contained in or conferred by the will.

The testator, *John Yerbury*, made his will, dated the 7th of *September*, 1841, in the following words:—"I give and bequeath to my dear wife, for her sole use and benefit, during her life, all my property, both real and personal, on condition that she pay, out of it, any bequest which I may make in this my will, or by any subsequent deed or codicil. I hereby authorize my wife, with and afterwards to their children. Held, that the tenants for life were not entitled to enjoy the property *in specie*, but that the perishable part must be converted.

A testator gave his real and personal estate to his wife for life, and afterwards to his two daughters, in such proportions as she might direct, and in default, to them equally. Held, that the wife could not appoint the property to such uses as the daughters (who were married) should appoint, so as to enable them to convey the realty without acknowledging the deed under the statute, and to dispose of a reversionary interest in the personalty.

with the consent of my executors, to sell or exchange any part of my property. I give and bequeath all my property, both real and personal (not otherwise bequeathed), after my wife's decease, to my two daughters, in such proportions as my wife, by any legal instrument, may direct; but if she make no appointment, then to be equally divided between them, and in case only one survive their mother, the whole to the survivor, unless the deceased daughter should leave any children, in which case they shall inherit the portion intended for their mother. It is my will that the fortune of each of my daughters shall go to her children, after her decease, in such proportions as she may direct, but if no appointment, to be equally divided between them."

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The testator died in *June*, 1843, leaving his widow and two married daughters, viz. *Mrs. Jebb* and *Mrs. Blood*, surviving him.

The residuary personal estate consisted of money in the funds, *East India* and other stocks, shares in companies, mortgages, &c.

By a deed-poll, dated the 23rd of *May*, 1844, *Mrs. Yerbury*, by virtue and in execution of the power given to her by her husband's will, directed and appointed, that from and after her decease, one moiety of the real estate, and one moiety of the personal estate of the testator, should go and be to such uses as *Mrs. Blood*, notwithstanding her coverture, should at any time, by deed or will, appoint; and in default of such appointment and subject thereto, in trust for *Mrs. Blood*, her heirs, &c., absolutely. And, in further exercise of her power, *Mrs. Yerbury* directed and appointed the other moiety of the real and personal estate of the testator, in a similar manner, to such uses as *Mrs. Jebb* should appoint,
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and in default of appointment, and subject thereto, to the use of Mrs. *Jebb*, her heirs, &c., absolutely. And, in further exercise of her power, Mrs. *Yerbury* directed and appointed, that the aforesaid appointments should take effect immediately upon the execution of the deed-poll, notwithstanding that the actual enjoyment of the property, which was the subject thereof, be postponed until her own decease.

On the following day, by an indenture dated the 24th of *May*, 1844, and made between Mr. and Mrs. *Blood* and Mr. and Mrs. *Jebb* of the one part, and the four trustees of the other part, reciting the testator's will, and the deed-poll executed on the previous day, Mrs. *Blood* appointed the moiety of the testator's real and personal estate, over which, by virtue of the will or deed-poll, she had a power of appointment, to the use of the four trustees, their heirs, &c., in trust, during the life of Mrs. *Blood*, to apply the rents, issues and profits, interest, dividends and income of the said moiety, as she should direct or appoint, and in default thereof, for her sole and separate use, without power of anticipation, and after her decease, in trust to pay the same to her husband, Major *Blood*, for his life, and directed that, after the decease of the survivor, the said moiety should be in trust for all and every, or such one or more exclusively of the other or others, of the children of Mrs. *Blood*, by either her then present or any future husband, as she should by deed or will appoint; and in default of appointment, in trust for all such children equally, as tenants in common, &c., their interests to be vested and transmissible, if sons at twenty-one, and if daughters at twenty-one or marriage, with powers of maintenance and advancement. And if there should be no child of Mrs. *Blood* who should acquire a vested and transmissible interest in the said moiety, then it was to be held  
upon

upon the same trusts for the benefit of Mrs. *Jebb*, for life, and after her decease, for Mr. *Jebb*, for life, and after the decease of the survivor, for the benefit of their children, on the same trusts, in all respects, as therein after declared of and concerning the other moiety, which was thereafter appointed by Mrs. *Jebb*. And upon failure of all the previous limitations, to such uses as Mrs. *Blood* should by deed or will appoint; and in default of appointment, to her, her heirs, executors, administrators and assigns. And Mrs. *Jebb* thereby appointed the other moiety, over which she had a power of disposition, by virtue of the will or deed-poll, to uses and trusts exactly corresponding, in favour of herself, her husband and her children, and in default of children, in favour of Mrs. *Blood*, her husband and children, with an ultimate limitation to such uses as Mrs. *Jebb* should, by deed or will, appoint; and, in default, of appointment, to her, her heirs, executors, administrators and assigns. And it was by the indenture further witnessed, and the parties thereto of the first part thereby declared, that the settlement so made was made with a full knowledge that doubts were entertained, whether, under the will of the testator, the children of Mrs. *Blood* and Mrs. *Jebb* would not, on the respective deceases of their respective mothers, have a right to the property so appointed by the deed-poll, in such proportions as their respective mothers should appoint, or in default of appointment, in equal shares, and it was their intention, notwithstanding the children of Mrs. *Blood* and Mrs. *Jebb*, or some or one of them, might in some measure defeat the settlement, yet that the trusts thereof should be carried into effect in all other respects. Then followed a clause necessary to effect its object, in case of the death of any of the children of Mrs. *Blood* and Mrs. *Jebb*, and powers to grant leases and

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and in default of appointment, and subject thereto, to the use of Mrs. *Jebb*, her heirs, &c., absolutely. And, in further exercise of her power, Mrs. *Yerbury* directed and appointed, that the aforesaid appointments should take effect immediately upon the execution of the deed-poll, notwithstanding that the actual enjoyment of the property, which was the subject thereof, be postponed until her own decease.

On the following day, by an indenture dated the 24th of *May*, 1844, and made between Mr. and Mrs. *Blood* and Mr. and Mrs. *Jebb* of the one part, and the four trustees of the other part, reciting the testator's will, and the deed-poll executed on the previous day, Mrs. *Blood* appointed the moiety of the testator's real and personal estate, over which, by virtue of the will or deed-poll, she had a power of appointment, to the use of the four trustees, their heirs, &c., in trust, during the life of Mrs. *Blood*, to apply the rents, issues and profits, interest, dividends and income of the said moiety, as she should direct or appoint, and in default thereof, for her sole and separate use, without power of anticipation, and after her decease, in trust to pay the same to her husband, Major *Blood*, for his life, and directed that, after the decease of the survivor, the said moiety should be in trust for all and every, or such one or more exclusively of the other or others, of the children of Mrs. *Blood*, by either her then present or any future husband, as she should by deed or will appoint; and in default of appointment, in trust for all such children equally, as tenants in common, &c., their interests to be vested and transmissible, if sons at twenty-one, and if daughters at twenty-one or marriage, with powers of maintenance and advancement. And if there should be no child of Mrs. *Blood* who should acquire a vested and transmissible interest in the said moiety, then it was to be held upon

upon the same trusts for the benefit of Mrs. *Jebb*, for life, and after her decease, for Mr. *Jebb*, for life, and after the decease of the survivor, for the benefit of their children, on the same trusts, in all respects, as therein-after declared of and concerning the other moiety, which was thereafter appointed by Mrs. *Jebb*. And upon failure of all the previous limitations, to such uses as Mrs. *Blood* should by deed or will appoint; and in default of appointment, to her, her heirs, executors, administrators and assigns. And Mrs. *Jebb* thereby appointed the other moiety, over which she had a power of disposition, by virtue of the will or deed-poll, to uses and trusts exactly corresponding, in favour of herself, her husband and her children, and in default of children, in favour of Mrs. *Blood*, her husband and children, with an ultimate limitation to such uses as Mrs. *Jebb* should, by deed or will, appoint; and, in default, of appointment, to her, her heirs, executors, administrators and assigns. And it was by the indenture further witnessed, and the parties thereto of the first part thereby declared, that the settlement so made was made with a full knowledge that doubts were entertained, whether, under the will of the testator, the children of Mrs. *Blood* and Mrs. *Jebb* would not, on the respective deceases of their respective mothers, have a right to the property so appointed by the deed-poll, in such proportions as their respective mothers should appoint, or in default of appointment, in equal shares, and it was their intention, notwithstanding the children of Mrs. *Blood* and Mrs. *Jebb*, or some or one of them, might in some measure defeat the settlement, yet that the trusts thereof should be carried into effect in all other respects. Then followed a clause necessary to effect their object, in case of the death of any of the children of Mrs. *Blood* and Mrs. *Jebb*, and powers to grant leases  
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and appoint new trustees, and a trustee indemnity clause.

Major *Blood* died in *July*, 1847, and Mrs. *Yerbury*, the widow, in *January*, 1848.

Mrs. *Blood* had had no children, and, considering her age, it was not probable she would ever have any.

The six Plaintiffs, the infant children of Mrs. *Jebb*, by their bill, claimed to have all the residuary estate of the testator, except that invested in the public funds, converted and invested in the public funds or government or real securities; but Mrs. *Blood* insisted, that all that remained unconverted ought to remain *in specie*, and that she was entitled to the income of a moiety thereof. The Plaintiffs also contended, that Mr. *Jebb* was not entitled, as against them, to a life interest in Mrs. *Jebb's* moiety; but that the powers of conversion, and investment and leasing, and of appointing trustees created by the settlement of the 24th of *May*, 1844, and all the trusts thereof (except in so far, as against them, it gave a life interest in Mrs. *Jebb's* moiety to Mr. *Jebb*), were valid, and the bill prayed relief accordingly. The case came on upon motion for a decree.

Mr. *Follett* and Mr. *Shapter*, for the Plaintiffs. The testator, in the first instance, gives an absolute interest to the daughters, after the death of the widow; but it is cut down to a life interest by the subsequent disposition. He says, in a new sentence, "It is my will, that the fortune of each of my daughters shall go to her children after her decease, in such proportions as she may direct; but if no appointment, to be equally divided between them." The children, therefore, of the daughters have indefeasible interests subject to the prior life

life interests of their mothers. The appointment of the 23rd of *May* was valid, to the extent that it gave the daughters a power of appointment over their shares; *Bray v. Hammersley* (a); and the question then is, whether the settlement of the 24th of *May*, 1844, was valid to any extent; *Alexander v. Alexander* (b). It is valid, except so far as it purports to defeat the interests of the children of the daughters, and to give life interests to their husbands. Being executed for valuable consideration, it was binding on the interest of Mrs. *Blood*, and upon her death, without issue, her share will go over to the Plaintiffs. They cited *Crozier v. Crozier* (c).

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Secondly, the tenants for life are not entitled to enjoy the property *in specie*, and the portion of it which is wearing out and perishable must be converted into a permanent fund *Howe v. Lord Dartmouth* (d).

Mr. *Wickens*, for Mr. and Mrs. *Jebb*, relied on *Phipson v. Turner* (e) to show that the widow was authorized in giving her daughters a power of appointment.

Mr. *Roupell* and Mr. *Shebbeare*, for Mrs. *Blood* and the trustees. The testator's daughters were entitled for life only, with remainder as to the share of each to their children, "in such proportions as she may direct." The widow had a mere power to determine the "proportions" in which the two daughters were to take, but she had no authority to give them absolute interests, or to affect the rights of their children. The testator in no way authorized his widow to enable his daughters, by means of a derivative power, to dispose of their real estate,

(a) 3 *Sim.* 513; affirmed 2 *Cl. & Fin.* 453, and 8 *Bligh*, 568.  
 (b) 2 *Ves. sen.* 643.

(c) 3 *Dru. & War.* 373.  
 (d) 7 *Ves.* 137 a.  
 (e) 9 *Sim.* 227.

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estate, except with the formalities prescribed by law, viz., by an acknowledgment under the Fines and Recoveries Act (a), nor to deal with their reversionary interests in a manner not authorized by law. The consequence is, that the appointment of the 23rd of *May* is invalid altogether, or operates merely as a limitation of the "proportions" in which the daughters are to take. The deed of the 24th of *May*, which purports to exercise an invalid power, was in no way binding on Mrs. *Blood* and is totally void.

Secondly, they argued, that this was not a case for conversion, and that this was shown by the power given by the testator to his widow to sell, only with the consent of the executors. On this point they cited *Alcock v. Sloper* (b); *Pickering v. Pickering* (c); *Daniel v. Warren* (d); *Burton v. Mount* (e).

Mr. *Follett*, in reply.

The MASTER of the ROLLS was of opinion that there must be a conversion, but he reserved his judgment on the remaining points.

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Feb. 19.      The MASTER of the ROLLS.

This suit is instituted for the purpose of enforcing the settlement of the 24th of *May*, 1844, and to have the trust estate of the testator transferred to the trustees of the

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|------------------------------------------------|--------------------------------------|
| (a) 3 & 4 Will. 4, c. 74.                      | (d) 2 <i>Younge &amp; C. (C. C.)</i> |
| (b) 2 <i>Myl. &amp; K.</i> 699.                | 290.                                 |
| (c) 2 <i>Beav.</i> 31; 4 <i>Myl. &amp; Cr.</i> | (e) 2 <i>De G. &amp; Sm.</i> 383     |

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the settlement, upon the trusts thereof. But, at the same time, the Plaintiffs contend, that though the settlement is operative and good, so far as regards the share of the daughter, Mrs. *Blood*, who had no children, it is not operative for the purpose of taking away anything from the children of a daughter who had children, and consequently, that the settlement is good, so far as regards the gift over, on the death of Mrs. *Blood*, without issue, but does not affect the children of Mrs. *Jebb*. They contend, that Mrs. *Blood* is bound by the settlement, except so far as any child of hers might contest it, and that a good consideration for the deed is to be found in the mutual limitations of the estates and interests, in favour of each daughter and her family, in the event of the other dying without issue.

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For Mrs. *Blood* it is argued, that the settlement is inoperative, so far as she is concerned, and that the widow of the testator had only a power to determine the proportion of the share which each daughter was to take, and none to settle it again, or to carve it out into qualified and partial interests, and still less to give each daughter a power of settling this property again, which was, in effect, to give them a power of dealing with a contingent reversionary interest.

With respect to the rights of the children of the daughters of the testator, neither the widow nor the daughters could effect their interests given by the will of the testator, *Thomas Yerbury*; and I am of opinion, that upon the true construction of the will, the children of each daughter took the share of that daughter, on her decease, in such shares as the daughter might appoint, and in default of appointment, equally amongst them. I think the will of the testator unambiguous on this point. The words are, "It is my will that the fortune

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tune of each of my daughters shall go to her children, after her decease, in such proportions as she may direct, but if no appointment, to be equally divided between them." This is a separate and independent clause of his will ; it is not, in my opinion, connected with, or made dependent upon, the absence of appointment by the widow, and it applies to the fortune of each daughter, whatever that fortune might be ; that is, whether it was acquired by virtue of the appointment by the widow, or in default of her appointment, solely under the will of the testator. The consequence is, that no power existed in Mrs. *Yerbury*, or in her and her daughters, to defeat this interest of these children, and therefore, whatever may be the result of my decision on the next question which I am about to mention, the settlement of the 24th of *May*, 1844, is, in my opinion, inoperative and void, so far as it seeks to impair or postpone the interests of Mrs. *Jebb's* children in Mrs. *Jebb's* share.

This, however, is but a very subordinate point ; and the really important question to be determined is, whether this interest is valid to any, and, if any, to what extent. On behalf of the Plaintiffs it is contended, that when a general power of appointment is given, as in the present case, it authorizes the donee of the power to create various estates under it, and to give qualified interests. Thus, a general power to any one to appoint a fund amongst children, in such proportions as he may think fit, authorizes his giving an estate for life, to one child, and the capital of the fund to another, and so on, provided he divides the whole fund in this manner amongst the children ; and many cases were cited to me which bear out this proposition, but particularly the case of *Phipson v. Turner (a)*, was referred to, as affording, not

(a) 9 Sim. 227.

not only a strong illustration of the proposition in question, but as being a direct authority in point for establishing the validity of this deed. In *Phipson v. Turner*, the mother had an absolute and exclusive power of appointment, under which she appointed the fund to a married daughter, for her life, for her separate use, and after her decease, as she should by will appoint, and in default of appointment and if she left no issue, unto two sons, who were also objects of the power; and this appointment was held to be good.

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Upon the best consideration which I have been able to give, I am of opinion, that the case before me is distinguishable from the case of *Phipson v. Turner* and the other cases cited to me, that it does not fall within the proposition I have stated, and that the deed of the 24th of May, 1844, is altogether inoperative and void, on the ground that it was made in pursuance of, and derives its efficacy from a power given by the widow, *Mrs. Yerbury*, which she had no authority to create.

The reasons which have led me to this conclusion, are shortly as follows:—I think it material, in these cases, to consider what is the real scope and object of the instrument conferring the power, and of the instrument by which the power is executed. In *Phipson v. Turner (a)*, the object of the instrument creating the power was, to give the mother a full power of dividing the property amongst the objects of it, as she should think fit, and the instrument which executed the power was, by the Court, held to be the same, in substance, as a disposition of the fund to the daughter for her separate use, with a general testamentary power of appointment, and, in default of the exercise of that power, to her two sons. It was, in fact, giving the daughter an

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estate for life, with a power of appointment, which was giving her the property in such a limited manner, as that, if not made use of by her, it would, under the mother's appointment, go to the other objects of the power.

Here the scope and object of the original instrument conferring the power is clear. By the will the property is given to the widow, for life; after her death it is given to the daughters, and if they have children, to their children after them; but the widow has a general power of determining in what shares the daughters are to take. I look, in vain, in this will, for anything that points to enabling the widow to give the daughters a power of disposing of their shares, while reversionary, and before they come into possession of their property. Then come the deed of the widow and the deed of settlement of the daughters, which may be treated as contemporaneous, and which obviously form part of one and the same transaction. The object of the widow's deed-poll of appointment is obvious. The ascertaining in what shares the daughters are to take, or the carving out and allotting to them their shares in the testator's property, is not the sole, or indeed, in my opinion, the principal, object of the deed. If it had been, I assume that, in accordance with the decision in *Phipson v. Turner*, the mother might have given qualified interest in this property to her daughters, provided she divided it wholly between them. But the real scope and object of the deed-poll, executed by the widow, appears to me to be, to enable the married daughters to dispose of their reversionary interests. The testator had given an estate for life to his widow, in his property, and after her decease, he had directed it to go to his daughters as she might appoint. If it had rested there and under this will alone, the daughters could have disposed of their reversionary

reversionary interest in the land only by deed, duly acknowledged under the statute, and in no way could they have disposed of their reversionary interest in the personal estate. In order to overcome the restraints imposed by the law on the alienation of the property of married women, the widow appoints to her daughters the reversion equally between them, to take effect at once, with a power of disposing of it by deed or will, notwithstanding their coverture. The power to appoint, given to the daughters, is not, as in *Phipson v. Turner*, a qualified mode of enjoying the property, but it is an attempt to overcome the disabilities attaching to the gift of the father in the hands of married women, and to enable the daughters to avoid the restraints imposed by the law, and to dispose of their reversionary property. This certainly formed no part of the scope and object of the will of the original testator, or of the purposes for which the power of appointment was vested in the widow. If this deed be good, it would have been equally valid if Mrs. *Blood* had appointed the whole fund in favour of her husband, and thus, in effect, had defeated the real object of the father's will, which was to make a provision for his daughters in such shares as his widow might think fit to appoint.

I regard, therefore, this transaction as showing, on the face of it, manifest signs, that the mode in which the power was executed by the widow, by giving power of alienation to her daughters, notwithstanding coverture, was not a mode in accordance with, but that it was opposed to, and at variance with the plain object for which the power was intrusted to Mrs. *Yerbury*. It is not, as in *Phipson v. Turner*, the conferring of a limited interest in the property and giving the rest to another object of the power, but the deed-poll gives, in substance, an absolute interest to each daughter in one moiety

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moiety of the property, and to this absolute interest superadds a power of alienation during coverture. With what view and object is this power added? Obviously only for the purpose of enabling the daughter to dispose of her property during coverture, or, in other words, as I have stated, of taking away from her that protection which the law throws around her, and which the testator did not think fit to dispense with. I am far from dissenting from the cases cited, or from disputing the general proposition contended for by the Plaintiffs; but I think it the duty of the Court, in the case of a power of appointment in favour of children, especially to look at the real scope and object of the power, and of the mode in which it is exercised, to see that it has been fairly carried into effect for the benefit of the children, and not sought to be eluded by a proceeding which, though it may be correct in form, is vicious in principle and opposed to the real object sought to be attained.

This is, in my opinion, the case here, and, in my opinion, the deed-poll executed by the wife was either wholly inoperative, or it was operative and availing only, so far as it divided the property of the testator equally between the two daughters; and that, so far as it sought to superadd to that division a power of disposition during coverture, it is defective and void. In either case the result is the same, and the settlement executed on the 24th of *May*, 1844, is, in my opinion, wholly without effect, and one-half of the testator's property vested in *Mrs. Blood*, on the decease of the mother, and the other moiety was vested in trust for *Mrs. Jebb*, for her life, and after her decease it will have to be divided amongst her children, in such shares as she may appoint, and in default of appointment, amongst them equally.

Probably

Probably it will be better for all parties that I should *make* a declaration to this effect, in which case the costs of all parties will come out of the fund, rather than that I should, by any other form of decree, leave the matter to be contested hereafter between these parties or by their children.

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ABSTRACT OF ORDER.

Declare the deed of the 23rd of May, 1844, inoperative and null and void, except so far as it appoints the property in equal moieties.

Declare the deed of the 24th of May null and void, and that Mrs. Blood is entitled to a moiety of the property, and, on her decease, her children (if any) will become entitled to the same, in such proportions, &c. &c. And in default of children, Mrs. Blood will be absolutely entitled to the said moiety (a).

Similar declaration as to other moiety. Direct inquiries as to the property, and what part should remain in specie.

(a) See *Carver v. Bowles*, 2 Russ. & M. 301; *Kampf v. Jones*, 2 Keen, 756; *Ring v. Hurdwick*, 2 Beav. 352; *Campbell v. Brownrigg*, 1 Phill. 301; *Green v. Harvey*, 1 Hare, 431; *Eaton v. Barker*, 2 Coll. 124; *Scuwin v. Watson*, 10 Beav. 200; and 2 H. & Tw. 124; 1 M. & Gor. 561; *Kay v. Winder*, 12 Beav. 610; and *Blackett v. Lamb*, 14 Beav. 490.

NOTE.—Upon appeal, the Lords Justices reversed the decision on the second point.

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Where two solicitors, who are not then in partnership, are employed in the same matter for a client, as in the defence of an action, the *prima facie* inference of law is, that they are partners as to that particular matter, and entitled to an equal share of the joint profits, irrespective of the quantity of work performed by each.

Where the contrary is alleged, the burden of proof is on him alleging it.

ROBINSON v. ANDERSON.


IN 1838, the owner of the market-place of *Easingwold* commenced actions against two persons for nonpayment of tolls and stallage, whereupon they and other inhabitants agreed to bear the expense of defending the actions; and they appointed a committee to communicate with an attorney for that purpose.

The Plaintiff, *Robinson*, was, in the first instance, retained by the committee to defend the actions; and he instructed Mr. *Fiddey*, his town agent, to enter an appearance, which was accordingly done.

The Plaintiff alleged, that on the 15th of *June*, 1838, in consequence of his being the relative or professional adviser of several of the joint owners of the market-place, he proposed that some other attorney should be retained jointly with him; and that thereupon the Defendant *Anderson* was appointed; that the Plaintiff then communicated with the Defendant, and informed him of the joint retainer, and all that had previously taken place, and that the Defendant thereupon consented to act jointly with the Plaintiff in the defence of the actions, and to divide the profits equally.

The Defendant denied that any proposal had been made to him as to the joint retainer, he stated, that he was retained by the Plaintiff, acting as he understood and believed, as the agent of the parties to the agreement, and that the only agreement come to between him and the Plaintiff was, that they should be respectively

tively paid for the business which they should respectively transact, and should advance the monies required to carry on the same, so far as was necessary with respect to the particular business transacted by them respectively, and that no agreement was come to as to their respective shares of the profits.

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In the latter end of 1845, the Plaintiff being unwilling to lay out more money, communicated with the Defendant, and offered to relinquish all further participation, if paid his costs out of pocket. The Defendant not agreeing to this, the Plaintiff, on the 22nd of *January*, 1846, communicated the correspondence to the committee, and expressed himself as hopeless of a favourable issue, and thereupon they resolved that the Defendant should proceed himself.

Ultimately, and on the 9th of *February*, 1848, the parties to the actions agreed that they should be stopped, that the Defendant should have judgment, and that each party should pay their own costs.

The Defendant afterwards, without consulting the Plaintiff, delivered to the committee a separate bill of costs, amounting to 1,058*l.* 16*s.* 7*d.*, but not containing any entries respecting monies laid out by *Fiddey* (the town agent), and making no mention of the Plaintiff. In *June*, 1849, the Plaintiff delivered another bill of costs to the committee, amounting to 736*l.* 14*s.*, including *Fiddey's* items, which, after deducting sums received, showed a balance of 662*l.* 1*s.* remaining due; of which the Defendant was entitled to 317*l.* 16*s.* 3*d.*, and which, together with 107*l.* 13*s.* costs out of pocket, amounted to 425*l.* 9*s.* 3*d.*

The Plaintiff then applied for an equal division of
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the monies received by the Defendant, but the latter said he had nothing to do with the claims of the Plaintiff.

The Plaintiff then filed his bill to obtain a declaration of his right, and for an account and division of the clear profits of the business.

Mr. *R. Palmer* and Mr. *Rendall*, for the Plaintiff.

Mr. *Roupell*, and Mr. *C. C. Barber*, for the Defendant. There has no doubt been a retainer of the two solicitors, but the question really is, whether a partnership was constituted, and if so, what were its terms. The committee, who had the management of the matter, were of opinion that another person, besides the Plaintiff, should be employed, and in fact the Defendant was brought in, in order to control the Plaintiff. There were separate retainers for one matter of business, but no partnership. Nothing passed between the parties which amounted to a contract to divide the profits; it was like a joint appointment of two surgeons, but nothing like a partnership was created; the Plaintiff and Defendant were each to take certain duties in defending the actions, and to receive the remuneration due for their respective work.

The question is, what does the law imply as a conclusion from the employment, in one matter, of two professional persons. If two persons of different standing, and whose services were of different value, were employed, that would not constitute a partnership. The observations of Vice-Chancellor *Wigram* in *Webster v. Bray(u)*, show, that even where there is a joint retainer, there

(a) 7 *Hare*, 167—170.

there is not necessarily a partnership, but here there was not even a joint retainer. In *M'Gregor v. Bainbriggs (a)*, it is said they would "*prima facie* share in the profits," but that depends upon a variety of considerations, such as the condition of the parties, the nature of the business, &c., for it is not a conclusion of law that the profits of separate labour are to be equally divided. Both parties inserted charges in their bills for attendances at consultations between them, this could not be if they were partners.

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If, as I suspect, charges for consultations between two solicitors, jointly employed, would, on taxation, be struck out, the argument raised on these charges fails, because the charges would be improper.

Mr. *R. Palmer* was stopped in his reply by

The MASTER of the ROLLS, who said he would read the evidence before hearing the reply. His present impression was, that he must presume a partnership, and in the absence of agreement, the profits must be divided equally.

The MASTER of the ROLLS.

Feb. 14.

In looking through these papers, and the correspondence which has taken place, I have directed my attention, in the first place, to the point which is always very material, namely, on whom the burden of proof lies; and what, in the absence of proof, the Court must consider

(a) 7 *Hare*, 164, n.

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consider to be the law which regulates the rights of the parties.

Now I should entertain no doubt, even if I had not been confirmed by the two cases of *Webster v. Bray* (a) and *M'Gregor v. Bainbrigge* (b), that where two solicitors undertake a matter of business on behalf of a client, the same rule would follow in that, as in any other undertaking where two persons carry on a business jointly on behalf of themselves, or as agents of other persons. It is, in point of fact, a limited partnership for a particular sort of business. Assuming nothing to have been said as to the manner in which the profits were to be divided, it appears to me to follow, as a necessary consequence of law, that they are to be divided equally between them. And, although one may do more business and have exerted himself more than the other, yet, if nothing is said upon the subject of profits, the presumption is, that they are to be equally divided between them. It appears to me, that if the clients had gone to Mr. *Robinson* and Mr. *Anderson*, and said, "We wish you to undertake the business for us," and thereupon Mr. *Robinson* and Mr. *Anderson* had both said, "We agree to do so," and nothing had taken place between them as to the manner in which they were to be paid, the necessary consequence would have been, that after payment of the costs out of pocket, the net profits made by the business would have been divisible equally between them, and that neither of them could say to the other, "I have done more business than you have, and am, therefore, entitled to a larger share of profits." It was the duty of the party who intended that this should not be a partnership transaction, and that he should be paid for the amount of business

(a) 7 *Hare*, 159.

(b) 7 *Hare*, 164, n.

business which he did, without participating in that of the other, so to express himself.

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The state of the case is, that the clients in this case, the Defendants in the actions of *Lockwood v. Wood*, went to Mr. *Robinson*, their solicitor, who acted for a little while, and then an arrangement took place, by which he was instructed by them to associate with himself Mr. *Anderson*, as the solicitor to conduct the defence. He goes to Mr. *Anderson*, and, as far as I can make out from the evidence, what took place between them was in substance this:—he said, “Will you join with me in carrying on this business?” and Mr. *Anderson* answered he would, and nothing whatever was said as to any division of profits, or respecting the remuneration of the parties. That is the result which I have arrived at, from the evidence of the Plaintiff, and from his cross-examination. If the case rested there, it appears to me that the presumption of law is, that the profits were to be divided equally. But if it is alleged that a different contract was come to at the time, who is it that is required to prove it? Why the person who alleges it, namely, Mr. *Anderson*. I have, therefore, looked through the evidence carefully, and my opinion is, that he fails in proving that any different contract was come to, and the documents appear to me to furnish evidence, to some extent, confirmatory of the view, that this was a joint business, and that the profits were to be equally divided. [*His Honor here referred to the letters.*]

It appears to me to be impossible to say, that there was that which Mr. *Anderson* is bound to establish, viz. any agreement or any contract between the parties, that each party should carry on his own business separately, and be paid for the business which he himself conducted,

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conducted, totally irrespective of the Plaintiff. I think not only that the contrary is proved, but that, in the absence of any evidence, the presumption of law would have been in favour of an opposite conclusion, upon the mere fact of a joint employment.

I must make a declaration, that the defence of these actions of *Lockwood v. Wood* and *Lockwood v. Lund*, down to the 23rd of *January*, 1846, was a joint employment, and that the Plaintiff and Defendant were interested in the profits, in equal shares and proportions.

Then direct an account of what is due to both parties upon these transactions.

I must give the Plaintiff his costs of so much of the suit as is occasioned by the Defendant disputing the joint liability. But further than that, I shall make no order as to costs, because I am not at all clear that in other respects the suit was absolutely necessary.

NOTE.—An appeal to the Lords Justices was dismissed with costs on the 25th of *May*, 1855.

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HATCH v. HATCH.

MRS. *HATCH* had a testamentary power of appointing the advowson of the rectory of *Sutton*.

Having three sons, *Thomas*, *Henry* and *Charles*, she by will, dated in 1807, appointed, that "upon the death of the present incumbent, or of any other incumbent that may be presented during the joint lives of me and my said husband," the trustees should present to the rectory her son *Henry*, "in case" (she proceeded to say) "he shall take Orders, and become qualified to fill the incumbency thereof; and in case he shall not take Orders and become a clergyman, or being so, shall die in the lifetime of my son *Charles Hatch*, then do and shall present to the said rectory of *Sutton* my son *Charles Hatch*, in case he shall take Orders and become a clergyman, and qualified to fill the incumbency thereof. And from and after their several deceases, or of such of them as shall take Holy Orders and be presented thereto, or upon the event of neither of them taking Holy Orders and becoming a clergyman, then upon such events so happening," she devised and appointed the rectory to her eldest son *Thomas Hatch*, in fee.

The testatrix died in 1819, and the living having first become

March 14, 15.

A., by will, directed trustees, "upon the death of the present incumbent," to present *A.* to the living of *S.*, in case he should take Orders; and if he should not, or taking Orders should die in the lifetime of *B.*, then to present *B.*, in case he should take Orders; and after their several deceases, or of such of them as should take Orders and be presented, or in the event of neither taking Orders, she devised the advowson to *C.* in fee. Held, that the gifts in favour of *A.* and *B.* were in succession and not alternative, and that on the death of *A.*, *B.* was entitled to be presented.

A testator having the power of disposing of an advowson (subject to the existing incumbency of *A.*, and a contingent right of *B.* to be afterwards presented), devised "the next avoidance thereof" in favour of *C.* Held, that "the next" meant, the next the testator had power to dispose of, viz. that following the incumbency of *A.* and of *B.*

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become vacant, in 1831, *Henry Hatch* was presented thereto, and was now the incumbent.

Thomas Hatch, the son, by his will, dated in *June*, 1831, devised the rectory to his trustees, "upon trust to present his son, *Henry John Hatch*, to the same, on the next avoidance thereof, if he be desirous of being presented to the same; and from and after such presentation, or in case of the relinquishment of the same by the said *Henry John Hatch*, or of his death before there shall be any avoidance of the said advowson, then upon trust to sell the same," for the purposes therein expressed.

Charles Hatch and *Henry John Hatch* were both in Holy Orders, and the two principal questions raised by this special case were, first, whether, under the will of *Mrs. Hatch*, *Charles Hatch* would or not be entitled to be presented to the rectory of *Sutton* upon the avoidance thereof by the death or cessation of the present incumbent, *Henry Hatch*, in his lifetime; secondly, if so, and he should become incumbent in the lifetime of *Henry John Hatch*, upon the first avoidance thereof, then whether, under the will of *Thomas Hatch*, the Plaintiff *Henry John Hatch* would or not be entitled to be presented to the same rectory, upon the next succeeding avoidance thereof by the death or cessation of the Defendant *Charles Hatch*, in the lifetime of *Henry John Hatch*.

Mr. *Lloyd* and Mr. *Faber*, for the Plaintiff *Henry John Hatch*. The question of construction is, whether the testatrix, *Mrs. Hatch*, is to be understood as directing two successive, or one alternative presentation; that is, whether *Charles* is still entitled to a presentation, or whether her direction was satisfied by the presentation of

of *Henry Hatch*, the present incumbent; the Plaintiff contends for the latter construction. That point will be determined by considering what was the particular subject of these various directions; for if you find the will referring to the avoidance next after the death of the then present incumbent, you cannot make the disposing power greater than the subject of disposition itself. Now look at the words. "The said trustees shall, upon the death of the present incumbent, or any other incumbent that may be presented during the joint lives &c., present my son *Henry Hatch*, in case &c., and in case he shall not take Orders, or &c., do and shall present my son *Charles Hatch*, in case &c." The words "die in the lifetime" must be limited to "dying before a vacancy." As to *Henry*, she means an avoidance after her own death; and adopting the same construction in the subsequent clause, the words "from and after their several deceases," &c., cannot be understood absolutely without any qualification, but must mean "deceases before a vacancy;" for suppose neither took Orders, if the words are to be taken in their absolute unlimited sense, then there is the whole period of their lives in which the presentation is to be made, and which may extend far beyond the subject-matter of the disposition, viz. the next avoidance after Mrs. *Hatch's* death. But further, it is from and after their several deceases, or of such of them as shall take Holy Orders, and be presented. That means one of them—"such one of them"—"such" meaning less than the whole number, and therefore there is to be but one presentation.

With respect to the will of *Thomas Hatch*, the son, who thereby directed his trustees to present *Henry John Hatch* to the living, "on the next avoidance thereof;" the question is, what he means by "the next avoidance thereof."

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thereof." "Next avoidance" must mean next with reference, not to the death of the testator, but next in reference to the thing devised. The question will not arise if the Court should hold that *Charles* is not entitled to be presented after *Henry*; but if, on the contrary, it should hold that he is so entitled, the question will arise. If it should be held that *Charles* is entitled after *Henry*, then it must be assumed that the testator knew it, and he must mean the next avoidance it was competent for him and not the next which it was not competent for him to dispose of. He was disposing of a reversion, and must mean "any next avoidance."

Mr. *Dickenson* for some of the parties interested in the proceeds of the sale. It is immaterial to the Defendants who are interested in the proceeds of the sale who, if only one, is appointed; the only difference would be, that *Charles* is older than the Plaintiff, *Henry John*. It is not the "next avoidance but one," as is contended by the other side.

Mr. *Shapter*, for one of the residuary legatees of *Thomas*, the son, interested in the proceeds of the sale, opposed the claim of the Plaintiff as heir at law of *Thomas*, and contended that the rectory passed under the trust for sale.

Mr. *Bristowe*, for the last two Defendants, contended, that the first will was satisfied the moment *Henry* was appointed to the living. The question, he said, turned upon the word "then," which referred to the period when the trust arose, that is, the death of the incumbent.

Mr. *R. Palmer*, Mr. *A. Smith*, and Mr. *Rasch*, for other Defendants.

Mr.

Mr. *Lloyd*, in reply.

The MASTER of the ROLLS was of opinion, first, that the reasonable construction of the will of the testatrix was, that the gifts in favour of her two sons, *Henry* and *Charles*, were successive, and not alternative.

Secondly, that the expression, "next avoidance," in the will of *Thomas*, must mean the next over which the testator's will could operate.

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# HINDLE v. TAYLOR.

March 15.

THE testator devised his real estate to his eldest son, *John F. Hindle*, for life; remainder to the use of two trustees (*Johnson* and *Custance*), for five hundred years; remainder to the sons and daughters of *John F. Hindle* successively in tail; remainders to *William F. Hindle* and his sons and daughters in like manner, with divers remainders over.

A testator directed two trustees to stand possessed of 5,000*l.*, in a certain event, "upon such trusts as were therein-after declared concerning the sum of 20,000*l.*, thereinafter bequeathed in trust for the benefit of his son *William*, his wife and children."

The trusts of the term of five hundred years were to raise portions for younger children; and if there should be a failure of sons of the body of *John F. Hindle* and of their issue, and any of the subsequent limitations should take effect, then *Johnson* and *Custance* were to raise 20,000*l.*, and stand possessed of one-fourth part thereof, "upon such trusts as were thereinafter declared concerning the sum of 20,000*l.* Three-and-a-Half per Cent. Consolidated Bank Annuities thereinafter bequeathed in

He afterwards bequeathed to two other trustees 20,000*l.*, in trust, upon a different event, to pay *William's* wife an annuity of

trust

200*l.* a year. Held by the Master of the Rolls, that she was entitled to two annuities, one out of each fund, if the income were adequate.

Annuities held not payable out of corpus.



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trust for the benefit of the testator's son, *William F. Hindle*, his wife, children and issue, as thereafter was mentioned."

The testator subsequently directed two other trustees (*Jackson* and *Pedder*) to stand possessed of the sum of 20,000*l.* Three-and-a-Half per Cents., upon trust to pay the dividends thereof to his son *William F. Hindle* for his life, and after his decease, in trust during the widowhood of the Plaintiff, his wife, to pay her out of the interest, dividends and annual produce of the sum of 20,000*l.* Three-and-a-Half per Cents., the clear yearly sum of 200*l.*, to be reduced to 100*l.* a year if she should marry again; the first payments to be made at the end of one calendar month after the death of *William F. Hindle*. And subject as aforesaid, the sum of 20,000*l.* Three-and-a-Half per Cents., "subject to the said provision for *William F. Hindle's* wife," were to be held upon trust for the children of *William F. Hindle*.

The testator died in *July*, 1831; *John F. Hindle* died in *February*, 1849, without having had any issue, and *William F. Hindle* died in *April*, 1853, leaving his wife *Elizabeth*, and two daughters, surviving. The widow claimed, during her widowhood, two yearly sums of 200*l.* each, one of them payable under the trusts of the one-fourth part of the sum of 20,000*l.* directed to be raised, and the other payable under the trusts of the 20,000*l.* Three-and-a-Half per Cents. And in case of a deficiency of the dividends to pay the first 200*l.*, she claimed to have it raised out of the *corpus* of the one-fourth of 20,000*l.*

Mr. *R. Palmer* and Mr. *Little* for the Plaintiff, Mrs. *Elizabeth Hindle*. The trust of the first fund is to be executed by different trustees from the trustees  
of

of the second. There are distinct trusts of the different funds, and the two annuities are in fact distinct gifts, to take effect at different times. The Plaintiff is expressly mentioned, and is as much an object of the testator's bounty as the sons and their children; and though the trusts of one annuity are referential, and to be determined by the trusts of the other, yet there is a distinct machinery for executing each of the two trusts, and one fund cannot therefore be considered an accretion to the other.

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It is the same as if the trusts were repeated. For brevity's sake the trusts are declared by reference; this is constantly done where there are gifts to several daughters; the trusts are first declared as to the portion of the eldest, and the trusts of the rest are declared by reference to them. It may be said, that the income of the one-fourth part of the 20,000*l.* to be so raised would not produce enough to pay an annuity of 200*l.* a year; but that proceeds upon the assumption that the investment must be made in Consols; but there being no provision or direction as to the mode of investment, the trustees may invest it, on real security, at five per cent., *Hill on Trustees* (a). Again, if the income be insufficient to pay the annuity, the *corpus* of the fund is chargeable with the deficiency; *May v. Bennett* (b); *Wright v. Callender* (c); *Foster v. Smith* (d); *Wroughton v. Colquhoun* (e).

*The MASTER of the ROLLS.*

I am with the Defendant on the second question as to the charge on the *corpus* of the fund.


Mr.

(a) Page 374.

(b) 1 *Russ* 370.(c) 2 *De G. M. & G.* 652.(d) 1 *Phill.* 629; 2 *Y. & C.*

(C. C.) 193.

(e) 1 *De G. & Sm.* 36.

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Mr. *Roupell* and Mr. *Prendergast*, for the Defendants, the daughters of *William F. Hindle*.

The two sums of 5,000*l.* and 20,000*l.* were to form one fund for the payment of one annuity of 200*l.* a year, and were to be governed by the same set of trusts. The 5,000*l.* was consolidated with the 20,000*l.* stock, and the annuity was to be paid out of the aggregate fund. The testator could not have intended 200*l.* a year to be paid out of the income of 5,000*l.* sterling; it was impossible. Something was also intended for the other objects of the testator's bounty, but nothing would be left for them if 200*l.* was to be paid out of the income, which would be about 150*l.* a year. The testator annexed the two funds, and directed the whole to be "upon such trusts as were thereafter declared." If, amongst the trusts declared of a freehold estate, there was one for raising a rentcharge for a widow, and afterwards copyholds and leaseholds were conveyed "upon such trusts as were thereafter declared," the widow would not be entitled to two rentcharges, one out of the freehold and the other out of the copyholds and leaseholds.

*The MASTER of the ROLLS.*

I am in favour of the Plaintiff, on the first point. I see no mode of reading this will, except by repeating in the first gift the trusts which are contained in the second part of the will. The testator gives 20,000*l.*, and directs that one quarter of it shall be held "upon such trusts as were thereafter declared concerning the sum of 20,000*l.*, thereafter bequeathed in trust for the benefit of his son, his wife and children and issue."

issue." That is to say, it is upon such trusts for the benefit of the son's wife, for the benefit of the son's children and issue, as are after mentioned. Then I must look at what those trusts are, and I must repeat them over again here. I cannot, in my opinion, read this as if these words were expunged, and as if the 5,000*l.* was to form an aggregate fund with the 20,000*l.*, 3½*l.* per cents. after mentioned, in which case, no doubt, there would be one consolidated fund, subject to the trusts described with respect to them both. But here the 5,000*l.* is to be held upon the trusts which are hereinafter declared concerning the sum of 20,000*l.* I am of opinion that I must repeat those trusts over again in the present instance. If those trusts were to give a life estate to the widow, she would take a life estate in both. In truth, the trustees of the 20,000*l.* are to give her an annuity of 200*l.* a year. The trustees of the other fund are to give her an annuity of 200*l.* a year, and I am of opinion that together they are to pay her two annuities. Nor can I see any just principle of construction, on which, introducing all the trusts which are mentioned respecting the 20,000*l.*, exactly as they stand, I am simply to exclude one of them, which is for the benefit of the wife, and more especially as he expressly introduces her as being one of the objects of his bounty with respect to the one-fourth of the 20,000*l.*

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The only serious argument arises from the admitted inadequacy of the fund, because the first fund will not produce 200*l.* a year; but I should construe that exactly in the same way as if this stood by itself, and there was a gift of one-fourth of 20,000*l.*, upon trust to pay her an annuity of 200*l.* a year. I should have no doubt that those trusts were to be executed as far as they could be, and the fact of the testator having given an annuity which could not be produced, unless the

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fund produced four per cent. per annum, would not, in my opinion, in any degree affect her right to receive what she would be entitled to receive under those trusts, if they were here repeated. Neither do I think that I am at liberty to cut down the construction of the first part of the will by a reference to the trusts of the other fourths.

When I refer to the trusts of the 20,000*l.*, then I think that the annuity of 200*l.* a year is limited expressly to come out of the annual produce. It is given to the trustees in trust, during the widowhood of *Elizabeth*, his wife, to pay her, "out of the interest, dividends and annual produce" of the 20,000*l.*, a clear yearly sum of 200*l.*, which, if she marries again, is to be reduced to 100*l.* I see nothing whatever, then, to charge it upon the *corpus* or capital of the fund; it is, in fact, a charge simply on the interest, dividends and annual produce, and if the annual produce is not sufficient to pay it, in my opinion, it fails, because it is charged upon that and not upon the *corpus*. Then he disposes of the fund, subject to her charge upon it, the dividends being sufficient for that purpose. It is merely giving the capital and remainder of the dividends to the children, and, in my opinion, it does not enable her to charge her annuity on the *corpus* of the fund, if the dividends should be insufficient.

The case of *May v. Bennett* (a) is distinguishable in many respects from this. In that case the testator had directed his trustees to invest such a sum of money as would produce 200*l.* a year. They did not invest such a sum as would produce 200*l.* a year, they invested such a sum of money as would produce 200*l.* at the time, but afterwards, by the effect of certain Acts of Parliament, it fell short of that, so that the testator's intention

was

(a) 1 *Russ.* 370.

was not carried into effect. The other case of *Wright v. Callender (a)*, seems to me, in substance, to be the same decision. There the testator had directed the trustees, out of his residue, to invest such a sum of money as would produce 2*l.* a week to his son. They invested a sum of money which did not produce 2*l.* a week for his son, and thereupon the Lord Justices held, that the primary intention was, that the son should have 2*l.* a week, and they therefore charged the *corpus* of the sum with that amount. But if he had expressly stated, that they should invest the residue, and out of the interest, dividends, and annual produce thereof, pay a certain sum of money, then a different question might have arisen. I am of opinion, therefore, that in this case the annuity is not charged upon the *corpus* of the fund.

I am further of opinion, that it is not incumbent upon the trustees to invest the 5,000*l.* on real security, for the purpose of creating a larger degree of interest, assuming that a larger amount of interest could be obtained without incurring any risk to the capital of the fund. I propose, therefore, to answer the two questions, not exactly as they stand in either event, but I should say that the Plaintiff is entitled to two annuities, if the interest of one-fourth of the 20,000*l.* be sufficient to pay a second annuity of 200*l.* per annum; but I am of opinion that the first annuity for 200*l.* is not charged upon the *corpus* of the one-fourth of the 20,000*l.*, which is given to her.

Let four-fifths of the costs come out of the 20,000*l.*, and one-fifth out of the 5,000*l.*, to be taxed as between solicitor and client, there being no residuary estate of the testator.

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NOTE.—Reversed on the first point by Lord Cranworth, L. C., 9th November, 1855.

(a) 2 *De G. Macn. & G.* 652.

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## TRUTCH v. LAMPRELL.

Jan. 24.

Two trustees having properly sold out trust money, one of them handed the cheque for the proceeds to the other, who misapplied it. Held, that they were both liable.

It is a contradiction in terms to say, that a trustee who acts is not an active trustee, and a defence by a trustee, that he only acted for conformity's sake is unavailing.

THE Plaintiff, *Caroline Agnes Trutch*, was entitled, subject to the life interest of her mother, to one moiety of a sum of 1,763*l.* 3*s.* 7*d.* consols, standing in the names of two trustees, *Lamprell* and *Holmes*.

Her mother, who had assigned her life estate to secure 640*l.*, proposed absolutely to assign her life interest to the Plaintiff, and that the Plaintiff should pay off the mortgage out of the proceeds of the sale of a moiety of the stock, which would then belong to her absolutely in possession. The Plaintiff assented, and on the 25th of *July*, 1853, an absolute assignment was executed to the Plaintiff. On the same day, *Lamprell* and *Holmes*, the trustees, at the Plaintiff's request, sold out one moiety thereof, and out of the proceeds paid the mortgage, leaving a balance of 193*l.* For this sum another cheque was drawn by the stock-broker, and put into the hands of *Holmes*, who handed it over to *Lamprell*, on a suggestion by the latter, that he had claims against the Plaintiff, which he would first settle, and then hand over the balance to her. *Lamprell*, having obtained the cheque, applied it to his own use. He claimed to retain the greater part of it for sums amounting to 138*l.*, for which he alleged the Plaintiff was liable to him; but, except 43*l.*, the Plaintiff repudiated the whole demand. The Plaintiff, being unable to obtain payment, filed her bill against *Lamprell* and *Holmes*, for an account and payment.

The case came on upon motion for a decree, *Lamprell*,  
having

having disappeared, the question argued was as to the liability of *Holmes*. The evidence, as to the circumstances connected with the delivery of the cheque for the 193*l.*, was contradictory, but the trustees failed to establish that the Plaintiff had concurred. *Holmes*, by his answer, stated, that he had become a trustee at the Plaintiff's request, and on the understanding that he was to have no trouble or responsibility in carrying out the trusts, which were to be borne by *Lamprell*.

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 v.  
 LAMPRELL.

*Mr. R. Palmer* and *Mr. C. T. Simpson*, for the Plaintiff, asked for a decree against both trustees.

*Mr. Lloyd* and *Mr. H. Stevens*, for *Holmes*. It appears that *Lamprell* had advanced monies to his *cui que trust*, he had therefore a right of retainer, and, having that right, he was also entitled to receive the fund. It was impossible for both trustees to receive the money for the cheque, and therefore *Lamprell* was the most proper person to receive it, and *Holmes* was justified, by the necessity of the case, in handing the cheque to his co-trustee; *Attorney-General v. Randall* (a); *Clough v. Bond* (b); *Ex parte Griffin* (c). [*The MASTER of the ROLLS* referred to *Bacon v. Bacon* (d); and see also *Hanbury v. Kirkland* (e).] The Defendant *Holmes* stipulated that he should not be an active trustee, and he acted, in this matter, for conformity's sake only. Lastly, the Plaintiff's concurrence has relieved him from all responsibility.

*Lamprell* did not appear.

*The*

(a) 2 *Eq. Ca. Ab.* 742.

(b) 3 *MyL. & Cr.* p. 497.

(c) 2 *Glyn. & J.* 114.

(d) 5 *Ves.* 331.

(e) 3 *Sim.* 265.



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*The MASTER of the ROLLS.*

As to the principles applicable to this case, there can be no question. This is one of those painful cases, which, unfortunately, this Court has constantly to deal with, where trustees, innocent of any desire to benefit themselves, have failed to perform their duties, and the Court is compelled to make them responsible. It is constantly argued by Counsel, but the conclusion is as constantly rejected by the Court, that a person who acts is not an active trustee, and is not liable, because he has only acted for conformity's sake. It is a contradiction in terms to say, that a trustee who acts is not an active trustee; by taking upon himself the office of trustee, and acting, he becomes, in that transaction at least, an active trustee, and is bound properly to perform all the duties appertaining to his office.

I am of opinion that it is impossible for *Holmes* to contend, with success, that he was justified in paying over the cheque to his co-trustee. The only ground alleged is, that *Lamprell* had a charge on the fund, but upon the evidence there is no trace of any. It would be no justification to a trustee to pay over a fund to a claimant, for then he might pay it over to any one claiming it.

I must make a decree for payment, with costs, both against *Holmes* and *Lamprell*.

I must give liberty to *Holmes* to apply, in case he should be able to make any claim against *Lamprell*, for contribution or otherwise.

I have some difficulty in respect to the claim of the  
Plaintiff's

Plaintiff's former solicitor on the fund. I must make the order for payment to the Plaintiff, and notice must be given to her solicitor that the payment will be made to her, unless he makes some application.

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v.  
LAMPRELL.

ATTORNEY-GENERAL v. MOOR.

Feb. 15.

**WILLIAM BECKWITH**, by his will dated in 1743, devised lands to *William Moor* and two others in fee, in trust for the establishment and perpetual maintenance of a free school within the chapelry of *Middlesmoor*, and to pay the proceeds to the schoolmaster. After the decease of the trustees, the appointment of schoolmaster was vested in the chapelwardens and overseers. The testator's will was proved in 1744. *William Moor* was the surviving trustee, and on his death the estate descended on *Robert Moor*, and on his death in 1796 on *John Moor*, and on his death in 1838 on *John Moor* the father, and on his death on *John Moor* the Defendant. The property had been managed by the family successively, and the rents applied by them towards the support of the school. The Defendant had, however, taken upon himself the whole control of the matter, claiming to appoint and remove the master as he pleased, and to eject him. He had only applied a portion of the rents towards the support of the charity. Under these circumstances the information was filed by the Attorney-General, at the relation of the chapelwardens, for an account of the rents as against *Moor*, and for his removal as trustee.

After the passing of the Mortmain Act (1736), lands were devised to trustees for a charity. The rents were so applied by the trustees and their heirs down to the present time. On an information against the heir to correct abuses, he set up the invalidity of the devise, but the Court held, that the onus of proving no other mode had been adopted to make the charity valid was on him, and that every presumption would be made in support of its validity.

The Defendant, by his answer, insisted that the  
devise

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devise for the establishment of the school was wholly void according to the provisions of the 9th *Geo.* 2, c. 36, "and that in consequence thereof, the estate devised to the said trustees was in fact undisposed of, and descended upon the heir at law of the said testator as the rightful owner thereof."

And he said as follows:—"I do not claim to be entitled to the beneficial enjoyment of the said premises, or to deal with or dispose of the same wholly, but I submit, that under the circumstances aforesaid, I am entitled to deal with and dispose of the same for the support of the said school, and in payment of the salary of a master, to be chosen and appointed by myself, in the same way as has hitherto been done by me and my ancestors, irrespective and uncontrolled by the void trusts, in the said will expressed and declared, for the erection and support of the said school."

Mr. *Roupell* and Mr. *Murray*, in support of the information. The Defendant, who is in possession as trustee, cannot be heard to dispute the validity of the charity; *Attorney-General v. Munro* (a).

Mr. *R. Palmer* and Mr. *Faber*, *contra*. The will of 1843 being subsequent to the Mortmain Act (1736) is invalid, and the trusts cannot therefore be enforced in equity; *Attorney-General v. Gardner* (b).

The MASTER of the ROLLS.

The way I look at this case is this:—The Attorney-General at the relation of the Chapelwardens of the chapelry

(a) 2 De G. & Sm. 122.

(b) 2 De G. & Sm. 102.

chapelry of Middlesmoor, asks to have the charity property administered, the rents of which for one hundred years at least have been applied in a particular manner, though not in strict accordance with the will, which appears to have been proved in 1744, and subsequent to the statute of Mortmain. I am of opinion, that in this state of things I must require the Defendant to prove his title, and must hold that the burden of proof lies on him. He says the will is void under the statute of Mortmain, but there are many modes by which the charitable trust might be valid, and it is not proved that they were not adopted. The Defendant suggests, that the Attorney-General should prove the enrolment of some deed under the statute; but even if there were none, I would assume that the heir at law disclaimed, and, if necessary, that every successive heir did the same. Will this Court, after this lapse of time, allow the trustee, because no regular enrolled conveyance is produced, to claim beneficially? The estate was given to the original devisees not beneficially, but as trustees on trust; is it possible to allow the heir at law of the surviving trustee to say, "I will perform the trusts so far as I think fit, and will apply the rest of the income to my own use and benefit?" It is obvious that this Court cannot allow it. This trustee can have no beneficial estate in the property except what he may derive from lapse of time, but his is no adverse possession. This Court will, after the time which has elapsed, presume that everything was done which would make the charity good.

The Defendant resists the chapelwardens and overseers in appointing a schoolmaster to the school, and in addition claims to take a portion of the revenues of the charity to his own use. This cannot be allowed, and I must make a decree declaring that the whole of the

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the income of this property, subject to the necessary outgoings, is applicable to the payment of the school-master, and that the chapelwardens and overseers are the persons to administer the charity. Seeing what has taken place, it is proper to remove the trustee and appoint a new one, and the costs of the Relator must be paid out of one half of the income of the charity. I will not direct a mortgage of the charity property; whenever I do so I provide a sinking fund for its discharge.

CARTWRIGHT v. SHEPHEARD (No. 2).

Dec. 20, 21.

Pending an account directed by the decree, the accounting party died.

An order was made, on motion to revive, against his executor, and that he might either admit assets or account for his testator's estate.

BY the decree an account was directed against an executor, *Henry Newport*. He died pending the inquiry, having appointed *Lewis Newport* his executor.

Mr. *Bevir* moved for an order to revive and carry on the accounts, and that *Lewis Newport* might admit assets of *Henry Newport*, or account. He referred to the 15 & 16 *Vict.* c. 86, s. 52.

The MASTER of the ROLLS at first doubted whether, consistently with the decisions of the other Judges, it could be done; but, on the following day, he made the order.

NOTE.—See *Edwards v. Batley*, 19 *Beav.* 457.

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ALEXANDER v. SIMMS.

THE Plaintiff *Alexander*, and the Defendant *Simms*, were joint owners of the ship "*Norman*," in the proportion of one-eighth and seven-eighths; and in 1850 *Simms* mortgaged his seven-eighths to the Defendant *Taylor*, who did not then take possession.

In *August*, 1851, the ship was despatched by the owners on a voyage for a cargo of guano, with which it returned on the 10th of *July*, 1852, to the *Liverpool* docks, where it commenced discharging. On the 23rd of *July*, 1852, *Taylor* took possession of seven-eighths of the ship and cargo, claiming to be entitled to the latter without deducting the expenses of outfit and voyage.

On the original hearing it was held, that the expenses of the outfit and voyage had priority over *Taylor's* claim, and that, in the absence of any special agreement, he had no right, as mortgagee of the ship, to any part of the cargo. He was ordered to pay so much of the costs as was occasioned by the claim so raised by him (a).

On the 20th of *July*, 1852, the Defendant *How*, the captain of the ship, had served a notice upon the trustees

(a) See 18 *Beav.* 83.

March 10, 12.

A suit between two shipowners, and the mortgagee of one, was dealt with as in an administration suit, by first directing the payment of all the costs (except the mortgagee's) out of the fund, and distributing the residue *pro rata*.

The captain of a ship served a notice on the trustees of the docks, in which the cargo of the ship was being discharged, not to suffer its removal till the freight was paid, and wrote to the owners of the ship to inform them that he had stopped the cargo till the wages of himself and the seamen had been paid.

In a suit between the owners and the mortgagee of one of them, the captain was made a party, and did not, by his answer, disclaim. The Chief Clerk found that certain sums were due to him in respect of wages, but that other sums claimed were not due. Held, that the Plaintiff was justified in making the captain a party, and that the latter was justified in not disclaiming, and was therefore entitled to his costs.

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trustees of the *Liverpool* docks to detain the cargo till the freight due thereon had been duly paid ; and on the 22nd of *July* he wrote to *Simms* that he had been summoned by the seamen for their wages, that he had no money for them or himself, and that he had stopped the cargo till he was paid. On the 23rd of *July*, *Taylor* took possession of the ship as mortgagee, and paid the wages due to the crew, excepting the captain. The captain was made a party to the suit, as was also the Defendant *Ernest*, to whom, before the arrival of the ship, *Simms* had assigned his estate for the benefit of his creditors. *How*, by his answer, claimed several sums as due to him besides wages ; but the Chief Clerk found that less was due to him than he claimed.

The cause now came on upon further directions, and as to costs. The cargo had been sold, but the proceeds were insufficient to meet the claims of all parties.

Mr. *R. Palmer* and Mr. *J. V. Prior*, for the Plaintiff.

Mr. *Rogers*, for *Simms* and his assignee *Ernest*.

Mr. *Roupell* and Mr. *Bevir*, for *Taylor*.

Mr. *Follett* and Mr. *Gill*, for *How*, the captain, cited *Abbott on Shipping* (a).

The MASTER of the ROLLS postponed judgment.

*The*

(a) By *Shea*, p. 370.

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*The MASTER of the ROLLS.*

I have now to dispose of the costs of this suit ; and, upon consideration of the circumstances of the case, I am of opinion, that the proper mode of dealing with the question is, to direct the costs to be paid, in the first instance, out of the fund. This is a contest between two partners in a joint transaction, and a mortgagee of the latter, claiming a lien on the fund. It is a common case, and therefore the costs must be dealt with in the ordinary manner. The order which I shall make will not alter the rights of the creditors, as against the two partners or the solvent partner, to compel payment of what is due to them from the transaction in which they were jointly interested. I must deal with the costs exactly as if I were administering the fund and distributing it among the several parties entitled, according to their respective priorities, although, in fact, the fund is insufficient for the payment of the various claims upon it. The costs of all parties, therefore, properly incurred, must be first paid out of the fund, and the residue must be divided *pro rata* between the parties who contributed to the undertaking, or have a lien upon it. As to *Taylor's* costs, I have already disposed of the question as to that part of the costs occasioned by his claim to seven-eighths of the gross proceeds of the cargo, and I see no principle upon which I can order his own costs of suit to be paid out of the fund, but I do not order him to pay any additional costs.

As to Captain *How*, his case presents more difficulty. Can it be said that he was an unnecessary party to the suit ; he had, it is true, given an inexcusable notice to the trustees of the docks to detain the cargo till the freight was paid or provided for, when, in fact, there was no freight to be paid, the ship having been sent out  
by

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March 12.



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by the owners themselves ; but whether he knew that or not, is not very material, because it was not a claim on his own behalf. He had, however, been summoned in the Admiralty Court by the seamen for wages, he wished for payment of what was due to them, and wrote the letter to *Simms* to that effect, and insisted on a lien to that extent ; as he was personally liable to pay the wages of the seamen, the claim contained in the letter was a proper one, and the letter itself quite excusable. In that state of things he was made a Defendant to the suit, and it is very difficult to say what course he ought to have taken. If he had put in a disclaimer, it would have been used against him to shew that there was nothing due to him, he was justified, therefore, in making a claim : then, on the other hand, according to the Chief Clerk's certificate, he claimed more by his answer than was due to him, but I do not think this sufficient to deprive him of his costs.

I think the Plaintiff had sufficient excuse for making him a party, and that, being made a party, he had sufficient excuse for not disclaiming, and therefore he must have his costs out of the fund.

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HELE v. Lord BEXLEY.

WHITFIELD v. BOWYER.

WHITFIELD v. KNIGHT.

Dec. 18, 19.

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Jan. 16, 17, 18.

Feb. 16.

**T**HE facts relating to this case have already been stated in 11 *Beavan*, 537 and 17 *Beavan*, 14, and it is therefore unnecessary to repeat them (a).

No account of bygone rents will be directed against a mortgagor in possession, nor against his agent, nor against a person claiming under his voluntary revocable deed.

The original bill in *Hele v. Lord Bexley* was filed on the 6th of April, 1829, and Sir *George Bowyer*, being out of the jurisdiction, process was prayed against him when he should come within it. He remained abroad, and was never served nor appeared in the suit.

On re-argument, the Master of the Rolls adhered to his decision in *Hele v. Lord Bexley*, reported in 17 *Beav.* 14.

After the hearing of the exceptions, (reported in 17 *Beavan*, 14), *Whitfield*, who was the assignee of the interest of *Hele*, filed a supplemental bill against Sir *George Bowyer* and twenty-seven other Defendants, praying, generally, to have the benefit of the former proceedings, and for payment of what was due to him. Sir *George Bowyer* was served with this bill and appeared; he insisted on the Statute of Limitations, and that he ought not to be bound by the proceedings in the other suits.

When a Defendant is out of the jurisdiction, and the bill prays process against him, when he shall come within it, the operation of the Statute of Limitations is suspended, though he has neither been served nor appeared in the suit.

The

(a) It is necessary to add, that the date of the conveyance from Sir *George Bowyer* to *Rowe* (the creditors' deed), referred to in 17 *Beav.* p. 15, was the 17th of January, 1815, but it was stated to have been executed on the 3rd of September, 1815. The validity of the Plaintiff's annuity was established in an action *Hunter v. Sir George Bowyer* (*Exch.*, 7th May, 1850). See 15 *Law Times*, 281.

1854. The original suit now came on for further directions,  
 together with the supplemental cause.
- HELE  
 v.  
 Lord BEXLEY. Mr. *Roupell* and Mr. *Speed*, for the Plaintiffs.
- WHITFIELD  
 v.  
 BOWYER. Mr. *Teed*, for *George Bowyer*.
- WHITFIELD  
 v.  
 KNIGHT. Mr. *R. Palmer*, for three annuitants.
- Mr. *Lloyd* and Mr. *Shapter*, for another annuitant.
- Mr. *Wickens*, for Sir *George Bowyer*.
- Mr. *Giffard*, for *Bridger*, a trustee.
- Mr. *Metcalf*, for *Huntingford*.
- Mr. *Follett* and Mr. *Goldsmid*, for *Donovan*.
- Mr. *Greene*, for *Vigor*.
- Mr. *Osborn*, for *Sturgis*.
- Mr. *Roupell*, in reply.

The authorities referred to were as follows:—That  
 “a judgment is at law no lien upon a legal term;”  
*Forth v. Duke of Norfolk* (a).

As to the effect of the owner of the estate being  
 abroad, and of process being prayed when he should come  
 within the jurisdiction; *Browne v. Blount* (b); The King  
 of *Spain v. Hullett* (c); *Kirwan v. Daniel* (d): and as  
 to

(a) 4 *Madd.* 503.

(b) 2 *Russ. & Myl.* 83.

(c) 3 *Sim.* 338.

(d) 7 *Hare*, 347; and see  
*Munoz v. De Tastet*, 1 *Beav.*  
 109, n.

to how far the former proceedings were binding on Sir George Bowyer, *Allen v. Papworth* (a).

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As to the operation of the Statute of Limitations, *Coppin v. Gray* (b); *Purcell v. Blennerhassett* (c); *Forster v. Thompson* (d).

As to the right to an account against a mortgagor in possession, and his agents, *Berney v. Sewell* (e); *Parker v. Calcraft* (f); *Gresley v. Adderley* (g); *Thomas v. Brigstocke* (h).

As to costs, *Tipping v. Power* (i); *Tovey v. —* (k).

On other points, *Hiles v. Moore* (l); *Rhodes v. Buckland* (m); and *Palk v. Lord Clinton* (n), were referred to.

*The MASTER of the ROLLS.*

Feb. 16.

The first set of these causes comes on on further directions, and the two others, which are supplemental to the former, on the original hearing; and it is the duty of the Court to pronounce an order settling the rights of the parties.

I endeavoured to do this, to a great extent, when the first cause came before me on exceptions to the Master's report

(a) 1 *Ves. sen.* 163; and *Bell's Supplement*, 92; and *Needler v. Deeble*, 1 *Ch. Ca.* 299.

(b) 1 *Y. & Coll. (C. C.)* 205.

(c) 3 *Jones & Lat.* 24.

(d) 4 *Dru. & War.* 303.

(e) 1 *Jac. & W.* 650.

(f) 6 *Madd.* 11.

(g) 1 *Swanst.* 573.

(h) 4 *Russ.* 64.

(i) 1 *Hare*, 405.

(k) 3 *Law J. (O. S.) Ch.* 46.

(l) 15 *Beav.* 175.

(m) 15 *Beav.* 213, n.

(n) 12 *Ves.* 48.

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v.

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report, two years ago, when I disposed of the exceptions and stated the view I took of the right of the parties at that time.

The Plaintiff in *Whitfield v. Bowyer* is the assignee of the interest of the original Plaintiff (*Hele*), and he has filed the supplemental bill, which is now brought to a hearing, seeking the benefit of the proceedings in the prior cause of *Hele v. Lord Bexley*. By this means and in this course of proceeding, the Plaintiff claims to be entitled to whatever the Plaintiff *Hele* could have obtained in the prior causes, and to that he appears to me to be entitled, subject, however, to a question which is raised by Sir *George Bowyer*, as to the extent, to which, if at all, he is bound by the prior proceedings, to which he contends that he was no party.

The Plaintiff *Whitfield* raises, again, several of the questions which were discussed on the exceptions against the late Defendant *Alexander Donovan*, and his representatives, and I have reconsidered these questions on the present occasion, in conjunction with the remarks which have been made to me respecting them. The questions relate to the rights of *Alexander Donovan*, and to the extent to which he is bound to account to the Plaintiff for the sums received by him out of Sir *George Bowyer's* estates.

I do not propose to state again the complicated facts of this case, which I have already done in a judgment I pronounced on this subject, in *April*, 1853, for the purpose of explaining the view I then took, and I abstain from doing so, the rather because the original causes are reported as they came on before Lord *Langdale*, in the 11th volume of Mr. *Beavan's* Reports (a),

and

(a) Page 537.

and before me, in the 17th volume (a) of that series, a reference to which will be sufficient to explain my views on the present occasion.

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The questions raised relate to two estates of Sir *George Bowyer*, the *Radley* Estate and the *Sunningwell* Estate. The Plaintiff seeks to make the estate of *Alexander Donovan* liable for what it shall appear that he has received from these estates, and to charge him as having no lien either on the *Radley* Estate or on the *Sunningwell* Estate, and as having received from the latter estate more than sufficient to satisfy the remaining judgment, which, it is contended, was the only subsisting claim which *Alexander Donovan* had against Sir *George Bowyer*. I have carefully reconsidered the subject, and, as might have been expected, I have come to the same conclusion now that I did in *April*, 1853. So far as regards the *Radley* Estate, no fresh facts, and, as I believe, no fresh arguments have been adduced to me to vary my opinion, and I accordingly refer to my published judgment, as expressing the view I then took and now take of that subject.

So far as regards the *Sunningwell* Estate, the matter has been gone into much more fully, and has been re-argued before me with much ability on both sides, with however the same result, so far as regards the opinion which I have formed. The short view of the case, as I regard it, is, that *Donovan* was an annuity creditor of Sir *George Bowyer's* for 333*l.*, and Sir *George Bowyer* was the beneficial owner of the *Sunningwell* Estate, which was held for the residue of a term of 1,000 years. This term had been assigned, in 1824, to *Rowe*, in a manner and upon trusts which, in my opinion, made it  
 a mere

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a mere voluntary trust for the benefit of Sir *George Bowyer*, which trusts he might have revoked at any time, and which estate he might have taken possession of, if and when he had so pleased. *Rowe* assigned this term to *Donovan*, who entered into possession of the estate, and received the rents and proceeds arising from it. His possession, in my opinion, was merely the possession of Sir *George Bowyer*. *Alexander Donovan* received the rents, and applied them in payment of the arrears and growing payment of the annuity of 333*l.*, due to him.

I have not now to consider what rights, duties and obligations might exist or be enforced as between Sir *George Bowyer* and *Alexander Donovan*, or how far the retention, by the latter, of these rents, to pay his own annuity, was justifiable, as against Sir *George Bowyer*, no such case is raised before me.

The case which is raised is this:—that the Plaintiff, being an incumbrancer on these estates, seeks to make *Alexander Donovan* account for all these rents so received by him, or that if he is to be allowed to retain any portion of them, it can only be so much as will be sufficient to discharge the amount of the judgment obtained by him to secure this annuity, and having so done, to make him account for and pay over the balance. This would, in my opinion, be taking an account against Sir *George Bowyer*, the mortgagor, of the by-gone rents of his estate, a proceeding which this Court does not sanction.

I am referred to many cases (*Berney v. Sewell* (a); *Parker v. Calcraft* (b); *Gresley v. Adderley* (c); *Thomas v. Brigstocke* (d)), all of which concur in confirming this

(a) 1 Jac. &amp; W. 650.

(b) 6 Madd. 11.

(c) 1 Swanst. 573.

(d) 4 Russ. 64.

this view of the case. *Donovan*, according to the opinion I expressed in 1853, was not in possession of *Sunningwell* as a judgment creditor, or as an incumbrancer, neither was he in possession as a trespasser. He was in possession only as the agent for Sir *George Bowyer*, or as a trustee for him, and his possession was, in my opinion, the possession of Sir *George Bowyer*. Between these two persons, as I have already stated, no question of set-off now arises before me.

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 BOWYER.  
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The Plaintiff *Whitfield* says, that *Donovan* was in possession under a trust deed executed to *Rowe*, and that he has disregarded these trusts, and must be made answerable accordingly. But the Plaintiff himself repudiates these trusts, and contends that they are inoperative and unavailing as against him. In truth, the deed was a mere voluntary deed, to which none of the *cetuis que trust* or any creditors of Sir *George Bowyer* were parties, and he alone, if any one, could insist upon the performance of these trusts.

I concur in the observations I made, as reported by Mr. *Beavan* (a), and I again ask, why was *Donovan* allowed to remain in possession of the rents, and why was not the appointment of a Receiver obtained? If the answer be, that a Receiver was applied for and refused, that is merely saying that the point raised by the Plaintiff was decided against him, on that occasion.

It is, in truth, contended by the counsel for *Alexander Donovan's* executors, with much force, that the question is not now open to the Plaintiff. The facts now appearing are all stated by *Alexander Donovan*, in his answer to the original suit; the question was argued before

(a) In 17 *Beav.* 33 and 34.



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before Lord *Langdale*, in 1849. The original bill had not raised this case, but it had been raised by the supplemental bill, and this additional relief, which had not been prayed by the original bill, was held by Lord *Langdale* not to be maintainable as against him, and accordingly he dismissed the supplemental bill, as against *Donovan*, as to all the relief which was prayed for by it, and was not prayed for by the original bill.

I think it unnecessary to go at greater length into this question. I am of opinion, that the account must be taken as against *Donovan's* representatives, in the manner I stated on the hearing of the exceptions in 1853. I am told that the Master's report is confirmed absolutely, if so, I must make an order discharging the order of confirmation, inasmuch as I allowed some of the exceptions, and with regard to others, directed that they should neither be allowed nor disallowed, in order that I might deal with them and with the whole question on further directions.

The remaining question which has to be considered is, the point raised by Sir *George Bowyer*, who claims the benefit of the Statute of Limitations. He was abroad when the original bill was filed; the bill prayed *subpœna* against him when he came within the jurisdiction, and he never was served with *subpœna*, or appeared in that cause or the causes connected with it. He has now been served, and appears for the first time in 1853, in the cause of *Whitfield v. Bowyer*, and takes the objection I have stated.

In favour of the objection it is urged, that *Browne v. Blount* (a); *The King of Spain v. Hullett* (b); and *Kirwan*

(a) 2 *Russ. & Myl.* 83.

(b) 3 *Sim.* 338.

*Kirwan v. Daniel* (a), all establish the proposition, that a person against whom process is prayed, only as and when he comes within the jurisdiction, is no party to the cause, and that being no party, it is contended, that the operation of the statute is not suspended by reason of the suit.

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On the other hand, I am referred to the cases of *Coppin v. Gray* (b); *Purcell v. Blennerhassett* (c); *Forster v. Thompson* (d), which seem to me to establish, that in such cases the operation of the Statute of Limitations is suspended. And this appears to me to be the rational course of proceeding, and to be consistent with the cases cited on behalf of Sir *George Bowyer*. In truth, these cases only establish, that the Defendant against whom process is prayed when he shall come within the jurisdiction, is not such a party as that active relief can be, without appearance, enforced against him personally, and that when this is necessary to work out the equities between the remaining parties to the suit, the suit is defective till he appears, or is put in such a situation that the orders of the Court can be enforced against him.

It would create and give facilities for frauds of many gross kinds, if a man, by keeping out of the jurisdiction of the Court, could prevent the statute from running against him, but, at the same time, could claim the benefit of the statute against his creditors, who had taken every means in their power, by legal proceedings, to compel him to appear, and to obtain payment from him of the amounts due to them. I am of opinion, therefore, that the objection fails.

With

(a) 7 *Hare*, 347.

(b) 1 *Y. & Coll. (C. C.)* 205.

(c) 3 *Jones & Lat.* 24.

(d) 4 *Dru. & War.* 303.

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With respect to the decree, it may be convenient that counsel should go through the minutes and settle them now, after the observations which will, I think, dispose of the points argued by them.

With regard to the annuitants, for whom Mr. *R. Palmer* and Mr. *Lloyd* appeared, who neither claim the benefit of the suit, nor disclaim any interest in it, I am of opinion that the suit must be dismissed as against them without costs.

NOTE.—The case was subsequently, on the 26th of *February*, 1855, and 26th of *May*, 1855, discussed on the terms of the minutes. An appeal, as to part of the decree, is pending.

### RICHARDSON v. RUSBRIDGER.

March 10.

A stock legacy, bequeathed to several in succession, was appropriated by the executors, and the residue paid over.

In a suit between the remainderman and the executors alone, the legacy was transferred into Court, and the costs of suit were paid thereout. The

tenant for life afterwards filed a claim to have the amount of costs recouped out of the residue. It was dismissed with costs.

IN the case of the *Governesses' Benevolent Institution v. Rusbridger* (a), the executors and trustees alone were parties, and Mrs. *Richardson*, the tenant for life of the 12,000*l.*, now alleged that she had no notice of the proceedings in that suit.

Under the decree, a sum of 96*l.* Consols (part of the legacy of 12,000*l.* Consols, bequeathed to Mrs. *Richardson* for life), was sold out and applied in payment of the costs of that suit.

Mrs.

(a) 18 *Beav.* 467.

Mrs. *Richardson* now filed a claim against the executors and her husband alone, alleging, contrary to the fact, that at the time of the institution of the former suit, her legacy had not been appropriated, and claiming to have the 96*l.* replaced out of the residuary estate.

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Mr. *W. H. Clarke*, for the Plaintiff.

Mr. *Selwyn*, *contra*.

The MASTER of the ROLLS dismissed the claim with costs, to be paid by the Plaintiff's next friend.

# WATSON v. CLEAVER.

ONE of the questions in this suit was, when the Defendant, *Elizabeth Cleaver*, became a partner in a firm. The Plaintiff alleged it to have been in *June*, 1847, but *Elizabeth Cleaver*, by her answer (filed in *March*, 1853), insisted on its being in *February*, 1848), when the dissolution of the prior firm was gazetted.

Feb. 9, 13.

Seven months after notice of motion for a decree, the Defendant had given material evidence in another cause. On the application of the Plaintiff, nine days afterwards, the Court gave leave to use the additional evidence, though the cause was in the paper, but permitted the Defendant to explain it.

In *July*, 1854, notice of motion for a decree was given, but the cause had not been heard, though it was now in the paper. In the mean time, the Defendant had made an affidavit in another suit of *Watson v. Colchester*, and on the 31st of *January*, 1854, she had been cross-examined thereon, and had made, as was alleged, material statements as to the date of her becoming a partner.

Mr. *R. Palmer* and Mr. *Hemming*, now moved, under the

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the 26th order of 7th of *August*, 1852 (*a*), for leave to use the affidavit and cross-examination in the present suit. *Richards v. Curlewis* (*b*) was referred to.

Mr. *Greene*, *contra*.

Mr. *Roxburgh*, for two Defendants.

*The MASTER of the ROLLS*. I should like to consider this case.

*The MASTER of the ROLLS*.

Feb. 13. This was an application made to me, when the cause was in the paper, to allow the examination of the Defendant, taken in another cause, in another branch of the Court, to be used in this suit. I have had considerable doubt and hesitation as to what I ought to do. There has been no delay, because the examination only took place on the 31st of *January*, and as it is desirable that the Court should have before it all the means of coming to a correct conclusion, I think I must allow the evidence to be used; but I must guard against any misapprehension which may arise on the subject, by giving leave to the Defendant to file affidavits in explanation, subject to the right of cross-examination.

I was informed that there was other evidence given in the other cause, which would affect the Plaintiff in this, and I think that ought to be used, subject to the same restriction.

The cause must stand over for a limited time.

(*a*) *Ord. Can.* 468.

(*b*) 18 *Beav.* 462.

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NOTE.—The cause was heard on the 24th of *April*, 1855, when the affidavit and cross-examination thereon were read.

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JAMES HALL v. JOHN HALL.  
JOHN HALL v. JAMES HALL (a.)

Feb. 28.

March 5.

IN 1848, *John Hall*, who for thirty years had carried on the trade of a brewer, agreed to take his relative, *James Hall*, into partnership with him.

Claim of retiring partner to a share in the value of the goodwill of the business disallowed.

By indenture, dated the 20th of *March*, 1848, they covenanted to be partners for twenty-one years, determinable as after mentioned.

Two persons entered into partnership for twenty-one years, but in consequence of disagreements and misconduct, disputes ensued. The partnership was dissolved by decree, one consenting to retire and the other to take the stock and effects at a valuation.

By the 29th Article it was stipulated, that in case either of the partners should die before the expiration of the term of the partnership, then the surviving partner was to have the option of taking the share of the deceased partner "of and in the property, credits and effects of the said partnership," at a valuation. But in case the surviving partner declined to purchase, "the property and effects" of the partnership were to be collected in or converted into money and divided.

Held, that the retiring partner was not entitled to any allowance for his share of the goodwill, no provision being made by the partnership articles for such an allowance on a dissolution by death or by the retirement of one partner by notice during the term.

By the 30th Article, if either of the copartners should, during the continuance of the copartnership, be desirous of retiring from and disposing of his share and interest in the partnership, he was to be at liberty to do so, upon giving twelve calendar months' notice in writing; and in such case, the other was to have the option of purchasing "the share" of the retiring partner. But if he should not elect "to purchase the share," the "stock and effects" were to be sold, and

the

(a) S. C. 12 *Beav.* 414; 3 *Macn. & G.* 79.

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the partnership affairs wound up. If *James Hall* gave notice to retire, he was to execute a bond to *John Hall*, conditioned for the payment of 5,000*l.*, not to embark in any of the businesses within thirty miles for twenty years.

The partnership was carried on, but disputes and disagreements occurred, which at length arrived to such a pitch, that in *November*, 1849, *John* absolutely excluded *James* from the partnership business.

In this state of things, *James Hall* filed his bill against *John Hall*, praying that the articles of partnership might be performed.

*John Hall* filed a cross bill, praying a dissolution, and that the affairs might be wound up.

At the hearing of the two causes, in *August*, 1851, a decree was made, at the suggestion of the Court, whereby, *James* consenting to retire from the partnership, and *John* "consenting to take to the stock in trade and effects of the said partnership," as continuing partner, at a valuation, it was ordered, that *John* should be charged with the amount of such valuation. And it was declared, that the partnership should be dissolved from the date of the decree, and it was referred to the Master to take the partnership accounts, and to inquire "whether *James Hall* was entitled to any and what compensation, in respect of such dissolution."

The matter was afterwards transferred into chambers, when *James Hall* claimed the sum of 1,200*l.* as compensation, being two years' purchase of the interest formerly held by him in the said copartnership, at the rate of 600*l.* per annum, being the estimated amount of profits

profits realized by the copartnership, while the same existed.

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The Chief Clerk, on the 30th of *January*, 1855, certified, that *James Hall* was not entitled to any compensation in respect of the dissolution of the partnership. This finding was contested, and the matter came on for argument.

*Mr. Fooks*, for *James Hall*. The dissolution was brought about by the violence and misconduct of *John Hall*; and he, having thus retained the partnership business, must account to *James* for his share in the goodwill of the business, as part of the partnership property. This is not over estimated at two years' purchase.

*Mr. Lloyd* and *Mr. W. H. Clarke*, for *John Hall*, argued, that the Plaintiff had obtained a share of the business by misrepresentation, and had caused its dissolution by his misconduct and mismanagement, and that the acts of *John* were justifiable. They contended, also, that the terms of the articles and of the decree, precluded any right to or allowance for the goodwill of the business.

*The MASTER of the ROLLS* reserved judgment.

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*The MASTER of the ROLLS.*

*March 5.*

In this case, the opinion which I have come to upon the question of compensation for goodwill is, that the question is in fact concluded by the terms of the contract and the partnership articles.

The 29th and the 30th clauses of the partnership articles



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articles provide for what is to take place either on the dissolution, by the death of one of the partners, or by notice; and although they regulate how the partnership property is to be valued to the surviving or remaining partner, they in no way specify that any compensation is to be made for the goodwill. It is clear that if one of the partners had gone out upon twelve months' notice, he would not have been entitled to anything for his share of the goodwill. By arrangement between them, they might have waived notice altogether, and I am of opinion that this, in fact, is the effect of the course that has been adopted by them.

I am satisfied that this view which I have taken of the right to compensation is the best for both parties; for even if I adopted the view that *James* was entitled to compensation, I should not be satisfied with the mode in which he has attempted to prove it, or the amount which he has demanded, and I should be obliged to send the matter back to chambers, to enable me to arrive at the amount of compensation on some more satisfactory principle than that which has been suggested. This would require very careful investigation, occupy considerable time, and entail a great additional expense to the parties. I am satisfied, therefore, that the view which I take of this case is not only the right one, but that which is most beneficial to the parties themselves.

The result is, that I shall affirm the certificate, but give no costs on either side.

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*In re* FLUKER.

**M**R. *FLUKER* acted as the solicitor of the infant Plaintiffs, in a cause of *Timms v. Watson*, in which *Taylor* was their next friend.

By the decree on further directions, made by Vice-Chancellor *Stuart*, on the 31st of *May*, 1853, the costs of all parties in that suit were ordered to be taxed, as between solicitor and client, and paid out of the fund in Court; the Plaintiffs' costs to be paid to Mr. *Fluker*, their solicitor.

On the 15th of *February*, 1855, an order was made to change the Plaintiffs' solicitor, and on the 2nd of *March*, 1855, *Taylor* obtained an order of course, for the delivery by *Fluker* of "a bill of fees and disbursements, in all suits, causes and other matters of business in which he had been employed as the attorney or solicitor for the Petitioner" (*Taylor*), and for its taxation, &c., in the usual form. The petition, on which the order was obtained, stated the employment of *Fluker* by *Taylor*, in the suit of *Timms v. Watson*, "and in other matters," and that the Petitioner was desirous of obtaining the papers in the possession of *Fluker*, which, it alleged, he had refused to deliver until payment of his bill of costs.

The costs of *Fluker* in *Timms v. Watson*, had not yet been taxed or paid.

A motion was now made on behalf of *Fluker*, to discharge the *ex parte* order to tax.

*March 27.*  
*A.*, the next friend of infants in a suit, employed *B.* as solicitor therein and in other matters. An order was made, in the suit, for the taxation and payment to *B.* of his costs of suit. Before this had been done, *A.* obtained, *ex parte*, an order to tax *B.*'s bill in all the matters in which he had been employed for *A.* Held, that the order was regular.

Mr.

1855.

*In re*  
FLUKER.

Mr. *Roupell* and Mr. *J. H. Taylor*, in support of the motion, argued, that there had been a suppression, on the part of the Petitioner, of a material fact, namely, the existing order for taxation of the costs in the suit, and that this suppression invalidated the *ex parte* order; *In re Walker (a)*; *Re Winterbottom (b)*. Secondly, that the order ought to have been limited to such costs as had not already been ordered to be taxed, otherwise there would be two conflicting orders to tax.

Mr. *R. Palmer* and Mr. *Amphlett*, *contra*, were not heard.

*The MASTER of the ROLLS.*

I cannot accede to this motion. It would work injustice in many cases, if it were held that a client cannot obtain an order of course to tax his solicitor's bill, if any of the items happen to be included in an existing order to tax in a suit.

What would be the result? How is the client to get his papers? There may be additional costs not included in the decree, and is the client to wait until all the costs have been taxed in the suit? Mr. *Fluker* is no longer the solicitor in the cause, and cannot prosecute the decree himself, except by a special application; it must be done by the existing solicitor, although Mr. *Fluker* will be entitled to the amount of the Plaintiff's costs when ascertained.

There may be considerable inconvenience in having two bills of costs and two orders to tax, and I strongly advise the parties to come to some arrangement to obviate it. I must, however, refuse the motion with costs.

(a) 14 *Beav.* 227.

(b) 15 *Beav.* 80.

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## COX v. TOOLE.

IN this case there was an agreement for a mortgage of leaseholds for 270*l*.

Jan. 28, 29.

An equitable mortgagee, as of right, is entitled to a foreclosure, and not to a sale.

Mr. *Roupell* and Mr. *Surrage*, for the equitable mortgagee, asked for the usual decree.

Mr. *Lindley*, *contra*, argued, that the notice to pay at the end of six months had been waived.

*The MASTER of the ROLLS* reserved judgment.

*The MASTER of the ROLLS*, I have read the evidence, and am of opinion the Plaintiff is entitled to the usual decree.

Jan. 29.

Mr. *Roupell* asked for a sale.

*The MASTER of the ROLLS*. No; I think on an equitable mortgage, the mortgagee is only entitled to a foreclosure, except by consent.

NOTE.—As to the Court's discretion, see 15 & 16 *Vict.* c. 86, s. 48, and see *Jones v. Bailey*, 17 *Beav.* 582.

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*In re BEVAN.*

February 8.

Costs of a journey to *Paris* to obtain the execution of a deed disallowed, beyond the expense of doing it through an agent.

A SOLICITOR had charged 10*l.* 10*s.* for a journey to *Paris*, to obtain the execution of a deed, and 15*l.* 13*s.* 6*d.* for his expenses. The Taxing Master allowed 10*l.*, as the expense which would have been incurred in obtaining the execution in *Paris*, through an agent.

Mr. *R. Palmer* and Mr. *Fowler*, moved to review the taxation. They relied, first, on the urgency of the case, the settlement of the matter having been completed on the 11th of *April*, when the 24th was the last day on which it could have been effected. Secondly, that on another occasion, the expenses of a journey to *Paris*, by the express desire of the client, had been allowed on taxation, and that the client, though he had given no express directions, in the present instance, had afterwards sanctioned it.

Mr. *Cairns*, *contra*, was not heard.

*The MASTER of the ROLLS.*

The Master has come to a right conclusion. It is obvious, on the evidence, that it was not necessary to take this journey, and it stands on a totally different footing from the other journey, which was undertaken by the express desire of the client. The recognition amounts to this:—"I ought to pay in consequence of the advantage I have obtained from it." It is not a  
promise

promise or wish to pay, whether he was liable or not, in the same way as if he had originally directed the journey to be taken.

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*In re*  
BEVAN.

The motion must be refused.

### COARD v. HOLDERNESS.

March 3, 5.

**L**AZARUS HOLDERNESS, by his will, dated in February, 1851, appointed his son Henry Holderness, C. W. Coard and P. A. Coard, executors thereof, and bequeathed four legacies, and then proceeded thus:—"And, subject to the said four legacies, *I give, bequeath and dispose of all estate, effects and property, whatsoever and wheresoever*, which I am now or shall at the time of my decease be *possessed of or entitled to*, at law or in equity, or over which I have any right or power of disposition, unto my son Henry Holderness and C. W. Coard and P. A. Coard, *their executors and administrators*, upon trust to stand possessed thereof, and of the proceeds thereof, upon the trusts following, that is to say:—I direct the same to be divided into five equal parts or shares, and, as to one of such equal fifth parts or shares, upon trust to pay the income thereof, accruing from my decease, to my eldest son *Lazarus George Holderness*, during his life; and from and after his decease, upon trust, as to

The testator gave "all estate, effects and property, whatsoever and wheresoever," which he was or might be possessed of or entitled to "to his three executors, their executors and administrators," upon trust to stand possessed thereof, and the proceeds thereof, upon certain trusts for children and grandchildren. Held, that this, by itself, would pass real estate, but, upon the subsequent expressions, and the ge-

neral scope and object of the will, the contrary was held.

The Court, in this case, principally relied on the absence of the words "heirs," "devise" and "rent," and the use of the expressions "possession," "executors and administrators," "principal," the "balance," "the principal of the said legacies," the direction to claim a share from "his personal representatives," and the power to appoint new trustees, applicable to "executors" and not to "heirs."

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the *principal*, for all and every of his children and child who shall attain the age of twenty-one years," as tenants in common. And he gave the trustees a power of maintenance out of the income of the shares and of advancement to the extent of half "the presumptive share." But in case no child should live to acquire a vested interest, there was a gift over of "such principal." The testator then gave the other four-fifths upon like trusts for his sons *Henry* and *William*, and his daughters Mrs. *Langdon* and Mrs. *Porter*, and their respective children, in similar language applicable only to personalty as in the gift to *Lazarus George*. As to the second share, for instance, he directed 1,000*l.* 3*¼l.* per cent., or its value, to be deducted thereout, and gave the "balance" to another son; and throughout the whole, he spoke of "the original parts or shares or legacies." And as to the fifth share he proceeded as follows:—"And as to the other or remaining one of such equal fifth parts or shares, upon trust for, and I bequeath the same to, my son *William Holderness*, if living at my decease (who has been for many years absent and not heard of), but upon this express condition:—namely, that he the said *William Holderness*, if living at my decease, do, within seven years from the day of my decease, personally claim the same from my executors or the survivors or survivor of them, or the executors or administrators of such survivor, or other *my legal personal representative* for the time being, at the *Royal Exchange*, in the city of *London*, in the presence of two witnesses; and if he shall not so claim the same within the period aforesaid," then his share was to be in trust for the other four branches of his family. And he directed, "that the said fifth part of his estate, effects and property, intended" for *William* should, in the mean while, "be accumulated in the way of compound interest." There was a power for the trustees, or the  
last

last acting trustee, "or *his executors or administrators*," to appoint new trustees, in case the trustees, "*their executors or administrators*," should die or desire to be discharged, &c. &c.

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The testator had real and personal estate, both at the date of his will and at his decease.

On the death of the testator, his son *Lazarus George Holderness*, as his heir at law, claimed to be entitled to the real estate, on the ground that the testator died intestate as to it. The Plaintiff, a granddaughter of the testator, instituted this suit to establish the will and have the rights of all parties determined.

Mr. *Lloyd* and Mr. *Prendergast*, for the Plaintiff. The general words of description of the property are quite sufficient to include real estate, and the effect of them is not cut down by any apparent intention in this will to limit them to personal estate, or by any subsequent expressions contained in it. On the contrary, the testator, in framing his will, seems to be in search of the most general and extensive phrases, and the terms he employs, "all the *estate and property*," "whatsoever and wheresoever," "which he is possessed of or entitled to," or "has power to dispose of," are universal. There is nothing there specific, but all are general terms, of the largest and most comprehensive description. These cannot be rejected, but must include the whole real estate; *Hopewell v. Ackland* (a); *Tilley v. Simpson* (b); *Terrel v. Page* (c); *Midland Counties Railway Company v. Onwin* (d).

But, secondly, it will be argued that, because the testator has given the property to his trustees, "*their executors*

(a) 1 *Com. Rep.* 164.(c) 1 *Ch. Ca.* 262.(b) 2 *T. R.* 659, n.; cited 1 *Cor.* 362.(d) 1 *Coll.* 74.



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*executors and administrators*," he shews that he contemplated personal estate only. Too great stress, however, is laid on the words "executors and administrators," as pointing to personalty, but those words do not express devolution of property, but only the cesser of the trustees' interest by death, and there is nothing in the limitation of the property to the executors and administrators of the trustees, from which it would be inferred, that real estate was not intended to be included, especially since the late Wills' Act; *Doe d. Spearing v. Buckner* (a); *Doe d. Hurrell v. Hurrell* (b); *Hunter v. Pugh* (c). In using those words, the testator, probably, had in his mind the greater convenience of continuing the trust to the personal representative of the surviving trustee, than of allowing it to devolve upon his heirs. This takes place under the Bankrupt Acts, where the real estate of a bankrupt is vested in the personal representative of the assignee.

Thirdly, as to the other words used by the testator. He "disposes of all his estate." That is sufficient to pass realty. The words "their executors," the expressions "legacies," "stand possessed thereof and of the proceeds thereof," &c., are all evidently used with reference to a conversion, which the testator contemplated by the word "proceeds," but which he neglected to direct in explicit terms. Keeping this in mind, those words, and all the expressions used by the testator, applicable to trusts of personalty, become perfectly intelligible and consistent. They cited *Church v. Mundy* (d); *Saumarez v. Saumarez* (e); *Doe d. Ellis v. Ellis* (f); *Doe d. Morgan v. Morgan* (g); *Doe d. Hick v. Dring* (h); *Stokes v. Salamons* (i).

Mr.

(a) 6 T. R. 610.

(b) 5 Barn. &amp; Ald. 18.

(c) 9 L. J. (N. S.) Ch. 62.

(d) 15 Ves. 396.

(e) 4 Myl. &amp; Cr. 331.

(f) 9 East, R. 382.

(g) 6 Barn. &amp; Cr. 512.

(h) 2 Mau. &amp; Selw. 448, 454.

(i) 9 Hare, 75.

Mr. *Roupell* and Mr. *Doria*, for Defendants in the same interest, cited *Den v. Trout* (a); *Doe d. Wall v. Langlands* (b); *Noel v. Hoy* (c); *Thomas v. Phelps* (d); *Sanderson v. Dobson* (e); *William v. Thomas* (f); *Jongsma v. Jongsma* (g). 1855.  
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Mr. *R. Palmer* and Mr. *Sidney Smith*, for the heir at law. The real question is, whether the scheme of the will and the intention of the testator do not exclude the real estate. The gift is to the three executors, their *executors* and *administrators*, and not to their heirs, "upon trust to stand possessed thereof and of the proceeds thereof," on certain trusts, of which a long series is declared. Then he gives *W. E. Holderness* his share, if in seven years he claims it from "his legal personal representatives," and in the meantime he directs it to be accumulated till he comes to claim. This, with the effect of the other words, "effects," "legacies," "executors and administrators" of the trustees, shew, that he only contemplated personal estate. They cited *Church v. Mundy* (h); *Woollam v. Kenworthy* (i); *Doe d. Bunny v. Rout* (k).

Mr. *Lloyd* in reply. The testator uses "proceeds" in one place, and "income" in another, he therefore must be understood as referring to a sale of the real estate. *Meeds v. Wood* (l) was also referred to.

*The MASTER of the ROLLS.*

This case has been fully argued, and as I have had  
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|------------------------------------------|-------------------------------------------|
| (a) 15 <i>East</i> , 394.                | (g) 1 <i>Cor</i> , 362.                   |
| (b) 14 <i>East</i> , 370.                | (h) 15 <i>Ves</i> . 396.                  |
| (c) 5 <i>Madd</i> 38.                    | (i) 9 <i>Ves</i> . 137.                   |
| (d) 4 <i>Russ</i> . 348.                 | (k) 7 <i>Taunt</i> . 79; 2 <i>Marsh</i> . |
| (e) 10 <i>Beav</i> . 478; 1 <i>Exch.</i> | 397; 1 <i>Jarm. on Wills</i> , 659,       |
| <i>Rep</i> . 141.                        | 660.                                      |
| (f) 12 <i>East</i> , 141.                | (l) 19 <i>Beav</i> . 215.                 |

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an opportunity of considering it, I will express my opinion at once. Though I have striven to come to an opposite conclusion, this bequest does not, in my opinion, include the real estate. I have striven, because the Court is naturally anxious to arrive at such a conclusion as will not lead to an intestacy. On the whole view of this case, I am of opinion that the real estate is not included in the words used by the testator. There can be no question that the first words, taken alone, are sufficient to include the real estate: they are, "all estate, effects and property, &c., . . . power of disposition." No words can be larger than these, and I have not the slightest doubt that these words are sufficient to include real estate.

I am then of opinion, that the burden of proof is thrown upon the heir at law, to shew that these words are, according to the settled rules of construction, to be cut down so as to include personal estate only.

I think that the rest of the will does justify the Court in coming to the conclusion, that these words were intended to be confined to personal estate. The view I take of this case is this:—that these words are to be construed with due regard to the general scope and object of the testator, and that, for this purpose, the whole will must be looked at together. Now, the first peculiarity to be observed is this:—that there is not, upon the face of the will, a single expression which refers particularly or peculiarly to the real estate. The word "heir" is not to be found in it, nor are the words, "devise" or "rent;" there is nothing which points exclusively to real estate, although there are one or two expressions which are ambiguous. The reason on which my opinion is founded is very much the same as that in the case of *Doe d. Spearing v. Buckner (a)*, because  
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(a) 6 Term Rep. 610.

all the subsequent expressions are referable to personal estate. In the first place, having used these general words which I have stated, the testator gives the property to two persons, "their executors and administrators," without giving an estate of inheritance in the real estate. He does not use words properly applicable to a gift of real estate in fee. The trustees are directed to stand "possessed thereof" upon trust to divide the same into five parts, and pay the "income" of one part to his son *Lazarus* for life, and as to the "principal" upon trust for his children. The word "principal" has exclusive reference to personal estate. With respect to the next one-fifth, he directs that 1,000*l.* stock, or its value, shall be taken thereout, and he gives "the balance" to another son. As to the third share, he directs "the income" to be paid to his daughter, and on her death "in trust as to the principal of the said legacies," (still speaking of it as "principal of the legacy,") for her children. He does the same as to the fourth share. As to the fifth share, he gives it to his son, on condition of his personally claiming it within seven years from the testator's "executors, or the survivors or survivor of them, or the executors or administrators of such survivor or other his personal representatives for the time being,"—excluding the notion that there would be anything vested in the heir of the surviving trustee. He directs "that the said fifth part of his estate and effects and property" intended for his son *William*, (thus using the same words, "estate, effects and property," which he had before used,) should "be accumulated in the way of compound interest."

In the direction for the appointment of new trustees, the word "heir" does not occur, but he speaks throughout of the trustees, and their or his "executors and administrators"

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ministrators," evidently contemplating their duties to extend over personal estate only.

What is confirmatory of this is, that in the early part of the will he gives legacies and says, subject to the said four legacies, "I give, bequeath, and dispose of all estate," &c. It would be difficult to say that this would be a charge of the legacies on the real estate, and yet he seems to be disposing of something out of which the legacies are payable; this is confirmatory of the view I have taken. Again, he directs another legacy, in a certain event, to fall "into the residue of my estate,"—words still applicable to personal estate,—into which the legacy would naturally fall. All these observations appear to me to confirm the same view, that all the limitations seem applicable to personal estate. The word "proceeds" is the only word which is ambiguous.

Now, what are the authorities which should compel me to come to a contrary conclusion? In *Woollam v. Kenworthy* (a), the Court did proceed upon the context of the will, and upon the general form and scheme as demonstrating the intention. *Church v. Mundy* (b) does not appear to militate against this construction in any respect. In that case there was a general gift of "all such worldly estate and effects as it may please God to bless me withal, whether *real* or personal," using the word "*real*." There was no question that this would pass freehold estate, but the question was this:—whether, assuming he had no freehold estate, a reversion in copyholds would pass under these words. Lord *Eldon* held that it would pass, for otherwise no meaning could be attached to the words "*real estate*." *Church v. Mundy* shows

(a) 9 Ves. 137.

(b) 15 Ves. 396.

shows that the words "real estate" might be applied to a reversion of copyholds, where there were no freeholds to answer those words, but does not militate against *Woollam v. Kenworthy*, which laid it down that you must look to the whole will to discover the intention of the testator. You must always look to the general rule laid down by a Judge with reference to the case before him, and Lord *Eldon* says (a), "the best rule of construction is that, which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary." That rule has been applied to the case of *Church v. Mundy*, where the testator has disposed of real estate, having only a reversion in copyholds, and the consequence was that it would pass "unless there is something like declaration plain to the contrary."

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How does *Saumarez v. Saumarez* (b) affect this question? The testator had there disposed of his *Dorsetshire* estate to his son for life, and immediately proceeds to dispose of the residue of his property; Lord *Cottenham* held, as was stated by Sir *G. Turner* in *Stokes v. Salamons* (c), that he showed "that he had real estate in his mind by the disposition he had made to his son of a life interest only in that particular real estate," and having that estate in his mind, he proceeded to dispose of the residue of his property, and he therefore included the reversion of the estate given to his son for life. The intention of passing the reversion (the words showing that the testator had the real estate in his mind) was not to be overruled by a series of subsequent limitations applicable only to personal estate.

Here the testator has used ambiguous expressions, but I am of opinion that the rest of the will shows, that  
 he

(a) 15 *Ves.* p. 406.  
 (c) 9 *Hare*, 83.

(b) 4 *Myl. & Cr.* 331.

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will ambiguous expressions large enough to include the  
real estate, but I think the rest of the will shows that  
he did not mean to include it.

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In *Stokes v. Salamons* the testator had used the word "devise," which is only properly applicable to real estate. There is no such word in this will, and I think that the cases do not prevent me coming to the conclusion that the words used in the present will do not include real estate; and that, on the contrary, the general scope and object of the will all point to personal estate only, and show that he did not intend his real estate to pass by his will.

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## SHAW v. NEALE.

Jan. 29, 30, 31.

March 23.

**SETH SEWELL** died in 1836, having by his will given all his real and personal estate to his attorney and apothecary. The testator's heir, *James Neale*, a poor

A solicitor has no lien for his costs upon real estates re-covered by him for his client.

Under the 1 & 2 *Vict.* c. 110, and 2 & 3 *Vict.* c. 11, if a judgment creditor neglect to re-register within five years, the judgment becomes inoperative, as to purchasers, mortgagees and creditors, (both anterior and subsequent), until re-registration, from which period alone it then operates as against them.

A solicitor, pending his employment, took security for costs from a poor and illiterate client. Held, that, assuming a judgment creditor of the client had the same rights as the latter, still that, after ten years' acquiescence, the accounts would not be opened.

The *allocatur* of the Taxing Master, upon a taxation, does not, when registered under the 1 & 2 *Vict.* c. 110, constitute a charge on the real estate of the client.

The Plaintiff, a solicitor, obtained from his client securities on his real estate, whilst he wilfully obstructed the Defendant (the former solicitor) in obtaining a final order for payment of his taxed costs, which would have enabled him to obtain a charge under the 1 & 2 *Vict.* c. 110. The Court held, that the Plaintiff was nevertheless entitled to the benefit of his securities.

An estate was mortgaged to *A.* for a sum and further advances. Afterwards, *B.* obtained a charge on the estate, by means of a judgment. Held, that further advances made to the mortgagor by *A.*, after notice of the judgment, had no priority over *B.*'s claim.

The doctrine of the case of *Gordon v. Graham* (2 *Eq. Ca. Ab.* 598) doubted.

## DATES.

## MR. SHAW.

## MR. REMNANT.

1837. Compromise.

Feb. 1838. *Shaw* discharged, and *Remnant* appointed.March. 1839. Judgment and *elegit*.April. 1839. Master's *allocatur* registered.

June. 1839. }

April. 1840. }

Mortgages to *R.*Nov. 1840. *Allocatur* served.

Jan. 22, 1841.

Further charge.

Jan. 30, 1841. Order for payment registered.

Further charge.

Jan. 8, 1844.

Jan. 30, 1846. Five years expire.

Nov. 30, 1846. Re-registration.

Nov. 30, 1851. Five years again expire.

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Further charge.

Nov. 30, 1852. Re-registration.



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a poor and illiterate labouring man, unable to read or write, employed the Plaintiff, Mr. *Shaw*, an attorney, to prosecute his claim to the testator's real estate; and *Neale*, in 1836, obtained a verdict in an action of ejectment; a subsequent compromise between the parties, in 1837, acknowledged his right to the property, which was of the value of between 3,000*l.* and 4,000*l.* By an indenture, dated the 5th of *January*, 1837, certain outstanding terms therein, or in part thereof, were assigned to the Plaintiff, in trust for *Neale*, and to attend the inheritance.

In 1836, the Plaintiff, on behalf of *Neale*, had also instituted a suit in Chancery against the devisees of *Sewell*, for an account of mesne rents and profits of the premises recovered in the ejectment, and, by an order of the 26th of *November*, 1836, the devisees were directed to bring the title-deeds, &c. into Court, where they still remained; but, in consequence of the compromise, all proceedings, both at law and in equity, were stayed.

In *September*, 1837, the property recovered in the ejectment was put up for sale, in six lots, three of which were sold, and the deposits were paid to the Plaintiff. In *February*, 1838, *Neale*, who had as yet received no fruit of the litigation, acting under the advice of the Rev. *H. S. Taylor*, who from the first had taken a great interest in the case, discharged the Plaintiff, and employed the Defendant, Mr. *Remnant*, to act as his solicitor.

On the 8th of *February*, 1838, *Remnant* applied to the Plaintiff for his accounts, and afterwards obtained an order of the Court of Queen's Bench for the delivery and taxation of the Plaintiff's bill of costs against *Neale*.

The taxation in the Queen's Bench was proceeded with,

with, and, on the 11th of *April*, 1839, the Plaintiff obtained the Master's *allocatur*, finding 1,238*l.* 2*s.* 3*d.* due to him, which *allocatur*, the Plaintiff, on the 16th of the same month, registered in the Court of Common Pleas, in pursuance of the statute (1 & 2 *Vict.* c. 110).

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On the 17th of *March*, 1839, *Remnant* obtained from *Neale* a warrant of attorney to confess judgment for 1,000*l.* to secure 500*l.* and interest. On the same day, judgment for that amount was entered up and registered, and a writ of *elegit* was issued, by virtue of which the Sheriff delivered possession of the property to *Remnant*, who had ever since retained possession of it, and had received the rents since accrued due thereon. On the 12th of *June*, 1839, *Remnant* obtained from *Neale*, a mortgage on the property to secure two sums of 500*l.* and 147*l.* and interest, together with future advances. On the 16th of *April*, 1840, an agreement was entered into between *Remnant* and *Neale*, whereby, after reciting the previous securities, and that *Neale* was indebted to *Remnant* in a sum of 380*l.* 8*s.* 5*d.*, in addition to the former sums, the mortgaged premises were made subject to this further charge of 380*l.* 8*s.* 5*d.*, with interest thereon at 5*l.* per cent., making the total amount charged 1,027*l.* 8*s.* 5*d.* On the 23rd of *November*, 1840, *Remnant* obtained from *Neale* a warrant of attorney to confess judgment for the sum of 1,000*l.*, and judgment was entered up thereon the next day, and an *elegit* was issued and duly executed by the Sheriff.

On the 22nd of *January*, 1841, a further agreement was made between *Neale* and *Remnant*, whereby it was agreed, that, in consideration of the sum of 1,228*l.*, then alleged to be due from the former to the latter, all the estate and hereditaments of *Neale* should be charged with

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with the payment thereof, and interest thereon at 5l. per cent. from the date thereof.

From the time of obtaining the Master's *allocatur*, the Plaintiff had made every exertion to serve it on *Neale*, but was unable to do so by reason, as he alleged, of his being kept out of the way, at the suggestion and by the contrivance of *Remnant*, to prevent service. On the 14th of *November*, 1840, the Plaintiff, upon an application being made to the Court by *Remnant*, on behalf of *Neale*, for production of the title-deeds to the estate of the latter, obtained an order requiring *Remnant* to produce *Neale*, and accordingly, to avoid an attachment, he was produced at the chambers of *Remnant's* town agent, and duly served with the *allocatur*. The Plaintiff then, upon the 28th of *January*, 1841, obtained a peremptory rule of Court, or absolute order, for payment of the amount of the *allocatur*, which, on the 30th of the same month, he registered as a judgment for 1,238l. 2s. 3d. under the 1 & 2 *Vict.* c. 110, s. 19.

On the 30th of *July*, 1841, the Plaintiff purchased the benefit of the contract for one of the lots sold, and he claimed to retain the purchase-money for the amount due to him from *Neale*.

On the 8th of *January*, 1844, another settlement of accounts took place between *Remnant* and *Neale*, and *Neale* then executed a fourth mortgage to *Remnant*, dated the same day, and expressed to be made between *Neale*, of the first part, *Remnant*, of the second part, and *G. H. Good*, of the third part, whereby, after reciting the previous securities, and that the sums then due to *Remnant* amounted to 1,796l., and that in order to discharge that amount, as well as such further sums as might

might still arise or become due to *Remnant*, *Neale* had agreed to execute the indenture therein mentioned, it was witnessed, that, in pursuance of the agreement and in consideration of the amount then due to *Remnant*, and also such further and other sums as *Remnant* might advance or be called upon to pay, *Neale* conveyed the estate and hereditaments in question to *Good*, to hold the same to him and his heirs, in trust, that if *Neale*, on or before the 8th of *July* then next, paid to *Remnant* the sum of 1,796*l.* due and owing to him, and all further sums to be lent to *Neale*, (not exceeding in the whole the principal sum of 2,000*l.* and interest,) to reconvey the same; but if default were made, then upon trust to sell and apply the proceeds, first, in payment of the expenses of the sale, secondly, of the principal sum of 1,796*l.*, or such other principal sum as might then be due to *Remnant*, and all interest due thereon, and thirdly, after payment thereof, to pay the balance to *Neale*.

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On the 31st of *March*, 1852, a settlement of account was come to between *Neale* and *Remnant*, shewing the amount due to the latter to be 2,248*l.* 9*s.* 10*d.*

The Plaintiff's judgment having been registered on the 30th *January*, 1841, he neglected to re-register it within the next five years; it was however re-registered on the 30th *November*, 1846. He neglected again to re-register it until the 30th *November*, 1852, thus leaving, in both instances, an interval during which the registration ceased to be in full force.

On the 25th of *January*, 1853, *Neale* died, leaving the Defendant, *James Neale*, his only son and heir at law.

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In this state of things the Plaintiff, on the 31st of *January*, 1853, filed his bill against *James Neale*, the son, and *Remnant*, alleging that all the securities had been obtained by *Remnant* with a view to defeat his judgment for the 1,238*l.* 2*s.* 3*d.*, the amount of costs due for recovering the property on which *Remnant* had obtained his several charges, that the property would not have existed without such an outlay, and that it therefore should be subject to the Plaintiff's claim as a first charge.

He further alleged, that the obtaining of the rule of Court, which when registered had the effect of a judgment, was in every way obstructed and purposely delayed, and that every device was resorted to by *Remnant* for that purpose; and he insisted, therefore, that *Remnant's* conduct was fraudulent, and that the Court should so treat it, and should, as a consequence thereof, postpone his charges to that of the Plaintiff. The Plaintiff also sought to open the accounts settled between the Plaintiff and *Neale*, and to examine all the items, including the bills of costs, which constituted the amount for which the securities had been given. He insisted also, that if he should fail in establishing absolute priority to all *Remnant's* charges, he was, at least, entitled to rank above all securities obtained after the 30th *January*, 1841, the date of the registered order; and he asked a declaration, that he was entitled to a lien for the 1,238*l.* 2*s.* 3*d.*, and interest, upon the terms of years assigned to him, and the indenture of the 5th of *January*, 1837, upon the hereditaments recovered by *Neale*, deceased, upon the purchase-money of the parts thereof which had been sold, and upon the title deeds, &c. deposited in Court; and that, by virtue of the *allocatur* and rule of Court, and the order of the Court of Chancery, he had a charge in respect of the  
1,238*l.* 2*s.* 3*d.*,

1,238l. 2s. 3d., and interest, &c., upon all the hereditaments and premises late of *James Neale*, deceased, and upon such purchase-money; and that, in respect of such lien, he was entitled to a priority and preference to the judgment and incumbrances of *Remnant*; that he might be confirmed the purchaser of the lot so sold to him, and might be at liberty to retain the purchase-money in payment of the costs thereof, and of the money so due to him; that an account might be taken of the rents and profits received by *Remnant*, and for a receiver and an injunction.

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*Mr. Roupell* and *Mr. Elderton*, for the Plaintiff.

First, the Plaintiff has a lien for his costs on the property recovered by him for *Neale*; *Lloyd v. Mason* (a). The property in this case happens to be real estate, but that makes no difference; on every principle a solicitor ought to be reimbursed the expenses, by means of which the subject of the action or suit is recovered. Lord *Hardwicke*, in *Turwin v. Gibson* (b), says, "A solicitor has a right to be paid out of the *duty* decreed for the Plaintiff, and has a lien upon it." He here says the lien is on the *duty* decreed to the Plaintiff, which applies equally both to real and personal estate. In *Barnesley v. Powell* (c), Lord *Hardwicke* is still more distinct on the subject. He says, "If a solicitor prosecutes to a decree, he has a lien on the estate recovered, in the hands of the person recovering, for his bills." He adds, "In the present case the Committee has a lien on the lunatic's estate, and I will assist the solicitor as much as I can; therefore declare he stands in the place of the Committee, and has a lien on the lunatic's estate." The Reporter adds, "Q. if he had such lien? The Counsel for the solicitor doubted it." However, it appears from the orders

(a) 4 *Hare*, 132.(b) 3 *Atk.* 720.(c) *Amb.* 102.

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orders stated in the note, that the Committee was declared to have a lien for the amount due to the solicitor on the personal and *real* estate, and that the solicitor was entitled to stand in his place.

Whatever be the property or duty recovered, and whether it be real or personal estate, the same principle is therefore applicable, and the client shall not carry off the fruit without bearing the expense of recovering it, nor can a party do so who claims under him with notice of the lien.

The nature of a solicitor's lien on documents in his hands is very clearly dealt with by Lord *Cottenham* in *Richards v. Platel* (a), who considers it as equivalent to a contract. He says, "I cannot see how there can be any sound distinction on this point between the case of a solicitor claiming a lien on the papers of his client, and the case of any other creditor who holds a *security* for his debt." The lien of a solicitor on deeds is a legal right, *Pelly v. Wathen* (b), and it can be actively enforced as against a fund realized, though not as against the papers; *Bozon v. Bolland* (c). This right of the solicitor cannot be defeated by the notice or release of his client; *Pope v. Wood* (d), *Gifford v. Gifford* (e); nor, *à fortiori*, by a mortgage with notice. In *Ex parte Bryant* (f) the Court had, in the first instance, ordered costs to be paid by the adverse party to the client, but the latter being insolvent, they were ordered to be paid to the solicitor, by virtue of his lien. The client cannot, behind the back of his solicitor, by arrangements with his opponent, cheat the solicitor out of his lien; *Cole v. Bennett* (g).

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(a) *Craig & Ph.* p. 82.  
(b) 7 *Hare*, 351; 1 *De G. M. & G.* 16.  
(c) 4 *Myl. & Craig*, 354.

(d) 2 *Anstr.* 577.  
(e) *Forrest*, 109.  
(f) 1 *Muddock*, 49.  
(g) 6 *Price*, 15.

The lien is not destroyed by the proceedings taken by the Plaintiff to make his claim effectual, *Bawtree v. Watson* (a), though it might be superseded by taking a security; *Cowell v. Simpson* (b).

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But the Plaintiff is also entitled to a lien on the term of years which has been assigned to him, and also on the deeds in Court. On the first point they also referred to *Lambert v. Buckmaster* (c), and *Brooks v. Bourne* (d).

Secondly, the Plaintiff has priority by virtue of the registration, under the 1 & 2 *Vict.* c. 110, in the first instance, of the Master's *allocatur* (which was equivalent to a rule of Court for payment of the amount), and afterwards of the peremptory rule or absolute order for payment of the 1,238*l.* 2*s.* 3*d.* Even if the argument, that the registration of the Master's *allocatur* is within the provisions of the 1 & 2 *Vict.* c. 110, ss. 18, 19, and the 2 & 3 *Vict.* c. 11, s. 4, cannot be maintained, on the ground that it was not made under an order to pay, but under an order to proceed to taxation, and, therefore, the amount due was unascertained, still when the amount due had been ascertained, and the order of the 28th *January*, 1841, obtained and registered on the 30th of the same month, the Plaintiff from that time had a charge upon *Neale's* estates.

Thirdly, the judgment was not invalidated by its non-registry within five years, for the Defendant had distinct notice of its existence. The 4th section of the 2 & 3 *Vict.* c. 11, does not supersede the equitable doctrine of notice, and applies only to purchasers *without notice*. It was intended to protect persons who dealt with the  
owner

(a) 2 *Keen*, 713.  
(b) 16 *Ves.* 275.

(c) 2 *Barn. & Cr.* 616.  
(d) 1 *Price*, 72.



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owner of an estate in ignorance of existing judgments, and not persons who had full knowledge of prior equities. Again, the 3 & 4 Vict. c. 82, s. 2, limits the then existing effect of notice, and provides that no judgment shall affect purchasers unless registered, any notice notwithstanding. But this only applies to the original registration; for when once effectually on the register, the effect of its non-registration is governed by the previous act, and it is therefore still operative as against purchasers *with notice*. The restriction was intended for the protection of mortgagees subsequent to the expiration of the five years, who might be misled by the registry, and there was no intention to alter existing priorities by a subsequent accidental omission to re-register. The Plaintiff's judgment therefore is effective against all the Defendant's securities subsequent to the 30th of *January*, 1841.

Fourthly. But the conduct of *Remnant* has been such, that in equity all the securities ought to be postponed to the Plaintiff's claim. He fraudulently withdrew his client, and collusively prevented the Plaintiff's serving him, so as to obtain a final order for payment, which he might register and thus charge the real estate, and in the meanwhile, *Remnant* occupied himself in obtaining securities from his client on the estate for his costs. This was a fraud on the Plaintiff, of which the Defendant cannot take advantage. In *Blenkinsopp v. Blenkinsopp (a)*, a conveyance executed *pendente lite* to defeat the subsequent remedy for recovering alimony, by process of sequestration, was set aside as a fraudulent contrivance to defeat the Plaintiff of her legal remedies.

Fifthly. The Plaintiff stands in the place of *Neale*,  
and

(a) 12 *Beav.* 568.

and has a right to have the securities given by *Neale*, a poor and illiterate man, while the relation of solicitor and client subsisted, opened and examined, and to have the bills of costs taxed, and the securities given for them stand for the amount actually due on taking the accounts.

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Lastly, although the Defendant's securities cover future advances, still no such advances are valid as against the Plaintiff, after the Defendant had notice of the Plaintiff's charge on the estate. After that time *Remnant* could not even turn interest into principal; *Digby v. Craggs* (a), and *Montague v. Ratcliffe* (b).

*The MASTER of the ROLLS.*

My present impression is, that no case is made for setting aside *Remnant's* securities on the ground of fraud, nor can I say that any priority has been acquired by the Plaintiff on that account. I am of opinion that the Plaintiff has no lien on the property in respect of his having recovered it; and having no judgment until *January*, 1841, I think he had no charge on it till that time. The remaining question therefore is this: whether the Plaintiff is not entitled to a decree that *Remnant's* securities are to stand for what is justly due on them; and the question will arise, on taking the account, whether *Remnant's* securities are or not to be considered a prior charge.

Mr. *Lloyd* and Mr. *F. T. White*, for *Neale*.

*The MASTER of the ROLLS.*

I am of opinion that the Plaintiff is not entitled to any lien, by reason of the estate having been recovered through him. That claim cannot be supported, it would be

(a) 2 *Ambler*, 611; 2 *Eden*, 200.

(b) Cited 2 *Fonblanque* (4th edit.), 434, and *Ambler*, 611, n.

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be a species of champerty, and the cases cited are no authority at all for the proposition, that every action brought by solicitors in respect of real estate, would create a lien on the lands for the costs thereby incurred. I am of opinion that the Plaintiff had no charge on lands, until his final order was registered on the 30th of *January*, 1841.

I am also of opinion, that there is no case for setting aside the Defendant's securities, on the ground of fraudulent collusion. That he was keeping *Neale* out of the way appears to be the case, but I have not now to consider the propriety of that proceeding, but only whether it invalidates the securities given to *Remnant* for money actually due to him. I wish to hear Mr. *Remnant's* Counsel, as to whether I should not direct an account of what is really due on his securities, or whether I am concluded by the fact, that the sums appear on the securities themselves.

Mr. *R. Palmer* and Mr. *Karslake*, for the Defendant, *Remnant*, then addressed themselves to the remaining points. As to the claim of lien, as assignee in trust of the outstanding term, *Neale* never authorized the Plaintiff to take an assignment of them, nor did he execute it, and the assignment was made without his knowledge. Moreover, the terms comprised but a small part of the property recovered, and the Plaintiff, though he has the indenture of assignment, never had the deeds creating the terms in his possession, for they are deposited in Court. The Plaintiff was paid his costs of the ejectment, and even if a lien could be established, the terms are now extinguished by the act (8 & 9 *Vict.* c. 112). If the Plaintiff has any charge, it must be subject to all the Defendant's securities, for the effective registration of the Plaintiff's judgment is subsequent to  
all

all of them. This question depends on the construction to be put upon the acts of the 1 & 2 *Vict.* c. 110 and the 2 & 3 *Vict.* c. 11. The former of these gives (s. 18) to decrees and orders, &c. the effect of judgments in the Superior Courts of Common Law, and provides (s. 19), that such decrees, &c. are not to affect lands, &c. till registered in the Court of Common Pleas; and the latter act provides (s. 4), that all judgments, decrees, &c. registered under the provisions of 1 & 2 *Vict.* c. 110, shall, after the expiration of five years from the entry thereof, *be null and void* against lands, &c. as to purchasers, mortgagees or creditors, unless re-registered within five years, and so on *toties quoties*. A considerable portion of *Remnant's* charges were effected prior to the registration of the Plaintiff's judgment in 1841, and of those which were posterior in point of date, nearly all have gained priority. A judgment creditor may re-register after the five years have expired, but the question is, whether that re-registration operates as a registry of a judgment of that date, or has reference back to the date of the original registry, so as to give it priority over all the incumbrances on the estate executed in the meantime? The Plaintiff's registration expired on the 30th of *January*, 1846, and the re-registration was not until *November*, 1846, and during the interval the judgment became null and void as against the estate and incumbrancers thereon, and the same was the case at the end of the second term of five years. By the statute 3 & 4 *Vict.* c. 82, s. 2, notice of judgments is to have no effect as against incumbrancers, until registration or re-registration, as the case may be, and consequently *Remnant* is bound by notice only while there is a subsisting registration. Unless the judgment is re-entered within five years, the original entry is null and void, as against incumbrancers, and in that case, an entry after the five years is not strictly a re-entry, but  
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a new entry altogether, as appears from the act and the form in the books of the Court, and the fee in the two cases. The judgment, therefore, dates from the second re-entry.

The next question is, whether a mortgage for a particular sum and further advances is limited in its operation, by a judgment or mortgage subsequently obtained by another person, or, in other words, whether, where the first mortgage extends to future advances, a second mortgagee takes, subject to such liability? This was decided in *Gordon v. Graham* (a). The case is thus stated:—"A. mortgages to B. for a term of years, to secure a sum of money already lent to A., as also such other sums as should hereafter be lent or advanced to him. A. makes a second mortgage to C. for a certain sum, with notice of the first mortgage: and then, the first mortgagee having notice of the second mortgage, lends a further sum. *Per Cowper*, Lord Chancellor. The second mortgagee shall not redeem the first mortgage without paying as well the money lent after, as that lent before the second mortgage was made; for it was the folly of the second mortgagee, with notice, to take such security. But upon the importunity of the Counsel, it was ordered, that the Master should report what money was lent by the first mortgagee, after he had notice of the second mortgage." *Johnson v. Bourne* (b); *Blackburn v. Warwick* (c). A subsequent judgment creditor cannot be in a better position than a subsequent mortgagee.

As to the question respecting opening the accounts as between *Remnant* and *Neale*, the charges of fraud have

(a) 7 *Vin. Abr.* 52, pl. 3; 2 *Eq. Ca. Ab.* 598.

(b) 2 *Y. & C. (C. C.)* 268.

(c) 2 *Y. & C. (Ech.)* 93.

have been in a great measure withdrawn from the bill, and there is nothing to impeach the transactions which took place between them many years back. A taxation will not be directed after long acquiescence; *Plenderleath v. Fraser* (a); *In re Rees* (b); *Moss v. Bainbridge* (c); and if everything was *bonâ fide*, and the Defendant *Neale* does not dispute the accounts, the Plaintiff cannot now open them. They referred to *Langstaffe v. Taylor* (d); *Blunden v. Desart* (e), on the question of notice.

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Mr. Roupell, in reply. The 2 & 3 Vict. c. 11, s. 4, enacts, that all registered judgments shall, at the expiration of five years, be null as to purchasers, unless re-registered within "five years before the execution of the conveyance," for vesting the estate in "any such purchaser or mortgagee, for valuable consideration." The five years would therefore date from the conveyance to the purchaser. This cannot apply to conveyances anterior to the expiration of the five years. The statute does not say that a judgment re-registered after five years shall be null and void as against prior incumbrancers, or that it is to take date only from the time of re-registration.

*Gordon v. Graham* has been disapproved of, and the reasoning is inapplicable to a judgment; *Brace v. The Duchess of Marlborough* (f). A further advance after notice of a subsequent incumbrance must stand as a mere voluntary payment, for there exists no obligation to lend or to borrow a further sum. He referred to *Langstaffe v. Taylor*.

The

(a) 3 Ves. & B. 174.

(b) 12 Beav. 256.

(c) 18 Beav. 478.

(d) 14 Ves. 262.

(e) 2 Dru. & War. 405.

(f) 2 P. Wms. 491.

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*The MASTER of the ROLLS* reserved judgment.

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March 23.

The MASTER of the ROLLS.

The Plaintiff in this suit was formerly the solicitor of *James Neale*, since deceased, who, in the year 1836, was employed to prosecute a claim for the recovery of an estate in the county of *Lancaster*, in which he was successful.

In *February*, 1838, under the advice of the Rev. Mr. *Taylor*, a gentleman who had taken a lively interest in the affairs of *James Neale*, he discharged the Plaintiff from being his solicitor, and appointed the Defendant, Mr. *Remnant*, to be his solicitor in his place. The Plaintiff thereupon asked for his bill of costs and disbursements. The Plaintiff delivered his bill in *April*, 1838, which was taxed under an order of the Court, and the *allocatur* of the Master was made of the 11th of *April*, 1839, finding that on the balance of the bill of costs and the cash account, 1,238*l.* 2*s.* 3*d.* was due to the Plaintiff.

In spite of the exertions of the Plaintiff to serve *James Neale* with the *allocatur*, he was unable to do so until the month of *November*, 1840, and consequently he could not get the order absolute to pay the amount due until the 28th of *January*, 1841. On the 30th of that month he registered the order, which, under the statute, has the effect of a judgment. He has never obtained payment, and he has re-registered the judgment twice over, once on the 30th of *November*, 1846, and again on the 30th of *November*, 1852. The questions in this cause are, what are his rights on the estate so recovered by his exertions, as against the Defendant *Remnant*,
who

who has various securities on them? The fee simple of the property recovered is wholly absorbed by the combined effect of the charges of the Plaintiff and Defendant. *James Neale*, himself, is dead, and his son, who represents him, admits this to be the case, and he neither claims nor expects any benefit from this or any other proceedings relating to this property. The questions, therefore, lie wholly between the Plaintiff and the Defendant *Remnant*.

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Various claims were advanced, but that the Plaintiff is an incumbrancer on this estate, and that he is entitled to a decree to redeem the Defendant *Remnant*, and foreclose the equity of redemption, is not disputed. The extent of his incumbrance, also, is not in question; but where it is to rank, whether before all or any of the Defendant's charges, is the question to be determined. In order to obtain absolute priority over the Defendant, various contentions were raised by the Plaintiff, some of which are suggested by the bill, and were urged at the hearing of the cause, which I then disposed of, but to which I will shortly refer.

The first of these was, that the Plaintiff was entitled to a lien on the real estate recovered for the amount of his charges properly incurred in so doing. This was urged on the principle on which the Court acts, when it refuses to part with a fund in Court, produced by the exertion of a solicitor, until his costs of recovering it have been discharged. At the hearing I expressed my opinion that no such lien exists, either at law or in equity, on a real estate recovered by a solicitor. It is, in fact, contrary to all principle; it would, in truth, evade the provisions of the Statute of Frauds more completely even than the case of an equitable mortgage by deposit

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deposit of title deeds, and would be obnoxious to many other principles which I adverted to at that time.

It was, secondly, contended, on behalf of the Plaintiff, that the fact of registering the *allocatur* of the Master had the effect of a judgment, and created a charge on the estate, but this, also, I decided against the Plaintiff, such a claim being wholly unsupported by any provision to be found in the statutes of 1 & 2 Vict. c. 110, or of 2 & 3 Vict. c. 11, on which statutes alone, if at all, such a claim could rest. The sections referred to apply only to orders to pay a sum of money, but the *allocatur* of the Taxing Master, which finds the amount due, is not an order to pay that amount, which must be subsequently obtained.

In the third place, the Plaintiff contends, by reason of the conduct of the Defendant *Remnant*, he, the Plaintiff, is entitled to priority over all the incumbrances of that Defendant, or at least over those which are subsequent in date to his judgment; and as to the others, even if he be not entitled to priority, he contends, that he is entitled to open the account between *James Neale* and the Defendant, and that *Remnant* is only to be allowed so much as would appear to have been the amount actually due to him, at the respective times when he obtained these charges, in case, at that time, an account had then been taken between the late Defendant *James Neale* and the Defendant *Remnant*, and if his bills of costs had been properly taxed at that time.

And, fourthly, the Plaintiff contends, that under the clauses of the statutes above referred to, he is entitled to priority over, at least, all those charges of the Defendant which are subsequent to the 31st of *January*, 1841, when the Plaintiff obtained and registered an
order

order against *Neale* to pay the amounts found due on the Master's taxation. It was for the purpose of considering the various rights between the Plaintiff and the Defendant *Remnant* on this property, on these latter points, that I reserved my judgment, and I have since read through the evidence and correspondence, and considered these points, which involve some questions of nicety, both on the equities arising from the facts of the case and the construction to be put on several of the clauses contained in the statutes I have referred to.

For the purpose of stating these questions, and the conclusion to which I have come, I shall shortly refer to the dates of the various proceedings and acts of the parties. I shall first consider them wholly irrespective of the questions which arise on the statutes, in consequence of the delay of the Plaintiff to register his judgment on two occasions, as I have already stated, until six years had elapsed from the date of the previous registration. In the second place, I shall consider how the rights of the parties are affected by that circumstance.

It is impossible, in reviewing this case, not to be struck with the disastrous character of the proceedings, so far as regarded the interests of *James Neale* the father. He was a poor man, in a humble situation in life, unable to read or write, who earned his subsistence by daily labour. By the death of a distant relative, he became entitled, as his heir, to property, apparently of considerable value. His right to it was established in an action at law, followed by a compromise, which acknowledged his title to a landed property worth, apparently, 3,000*l.* or 4,000*l.* With the exception of a few shillings a week, allowed to him at the latter end of his life and until his death, he has received

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ceived nothing from his success. The property has been wholly lost both to him and to his family, and the steps taken by the Rev. *Thomas Taylor*, with a sincere desire to further his interest and afford him protection, appear to me to have accelerated, if they did not produce, this result.

The two solicitors have been quarrelling about the spoil, until not only the whole is gone, but the question now arises, which of the two is to exclude the other from payment of that portion of his claim which the estate will be insufficient to pay. Neither of them appears to me to have been free from blame in this matter, but I have not thought it proper or advisable that I should state more, with respect to the conduct of either, than is necessary to make clear the conclusion to which I have come.

In *March*, 1839, shortly before the Master made his *allocatur*, the Defendant *Remnant* obtained from *Neale* a warrant of attorney to confess judgment for 1,000*l.*, to secure the sum of 500*l.* and interest. On the following day judgment was entered up for that amount, and the judgment was registered. Execution was issued by writ of *elegit*, and the Sheriff delivered possession of the property to the Defendant *Remnant*, who has ever since retained possession of it, and received the rents which have since accrued due thereon. On the 12th of *June*, 1839, Mr. *Remnant* obtained from *James Neale* a mortgage on the property, to secure two sums of 500*l.* and 147*l.* On the 16th of *April*, 1840, articles of agreement were entered into between *James Neale* and Mr. *Remnant*, whereby (after reciting the previous securities, and that *James Neale* was indebted to *Remnant* in a sum of 380*l.* 8*s.* 5*d.*, in addition to the former sums) the mortgaged premises were made subject to this

this further charge of 380*l.* 8*s.* 5*d.*, with interest thereon, at 5*l.* per cent. per annum, making the total amount charged 1,027*l.* 8*s.* 5*d.* On the 22nd of *January*, 1841, immediately before the order to pay, a further agreement was made between *James Neale* the father and Mr. *Remnant*, by which it was agreed, that in consideration of the sum of 1,228*l.*, then expressed to be due from *James Neale* to the Defendant *Remnant*, all the estate and hereditaments of *James Neale* should be charged with the payment thereof, and interest thereon, at the rate of 5*l.* per cent. per annum, from the date thereof. After this, on the 30th of the same month, as I have already stated, the Plaintiff registered his judgment for 1,238*l.* 2*s.* 8*d.* On the 8th of *January*, 1844, Mr. *Remnant* came to another settlement of account with *James Neale*, and obtained from him a fourth mortgage of that date, which was expressed to be made between *James Neale* of the first part, *J. W. Remnant* of the second part, and *James Henry Good*, therein described, of the third part, whereby (after reciting the previous securities, and that the amount then due to Defendant *Remnant* amounted to the sum of 1,796*l.*, and that in order to discharge that amount, as well as such further sums as might still arise or become due to him, *James Neale* had agreed to execute the indenture therein mentioned) it was witnessed, that in pursuance of the agreement, and in consideration of the amount then due to the Defendant *Remnant*, and also of all such further and other sums as *Remnant* might advance or be called upon to pay, *Neale* conveyed the estate and hereditaments in question, to hold the same to the use of *Good* in fee, upon trust, that if *James Neale*, on or before the 8th of *July*, paid to *Remnant* the sum of 1,796*l.* then due, and all further sums to be lent to *Neale* (not exceeding in the whole the principal sum of 2,000*l.* and interest), to reconvey the same; but

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if default should be made, then upon trust to sell and apply the proceeds, first, in payment of the expenses of the sale; secondly, of the principal sum of 1,796*l.*, or such other principal sum as might be then due to *Remnant*, and all interest due thereon; and thirdly, after payment thereof, to pay the balance to *James Neale*. And the indenture contained various other clauses and provisions, which I do not think it necessary to refer to in detail. In *March*, 1852, a settlement of account was come to between *James Neale* and *Remnant*, by which the amount due to the latter was settled and agreed to be 2,248*l.* 9*s.* 10*d.*

The Plaintiff contends, that all these securities were obtained with a view of defeating his judgment and his just claim for costs, due for business done, and without which, the very property on which the Defendant had his charges, would not have existed, and that the order for the payment of his costs, which constitutes his judgment, was purposely delayed, and every device resorted to for that purpose. And the Plaintiff contends, that as a consequence arising from this conduct, this Court ought to treat the proceedings of the Defendant *Remnant* as fraudulent, and ought to postpone his charges to that of the Plaintiff. I expressed my opinion, at the time of the hearing, that this claim could not be maintained, and that whatever may be the opinion of the Court, as to the general course of conduct which has wasted this poor man's estate, I see no ground for acceding to the contention of the Plaintiff, that as between himself and the Defendant, he is entitled to priority over him. I have not thought it necessary to go into any discussion respecting the various circumstances bearing on this point, which were discussed at considerable length before me, and which are detailed, at great length, in the evidence and correspondence.

It

It is sufficient for me to say, that I see nothing in the **conduct** of the Defendant which should disentitle him **to** the fair, legal and equitable rights which belong to **him**, and are incidental to his securities; nor do I see **anything** in the conduct of the Plaintiff which should **disentitle** him to the same consideration. I see great **hostility** between them from the beginning. I see, on **the** part of the Plaintiff, a disinclination to accept any **reasonable** offer, which might assist either *James Neale* or the Defendant *Remnant*, and I see, on the part of **that** Defendant, a desire, in consequence of such **refusal**, to visit upon the Plaintiff such consequences as might frustrate or delay his obtaining the amount of his **just** claim on *James Neale*.

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The next point I have to consider, subject to those I have already mentioned, is whether the Plaintiff is entitled to open the account as between the Defendant *Remnant* and *James Neale*, whether he is now at liberty to canvass the propriety of each item, including therein the bills of costs which constituted the amount for which the security was given. I stated at the hearing, and I repeat my opinion, that in no event could the position of the Plaintiff stand higher than that in which *James Neale* would have stood, had he now sought to take this account, and that if *James Neale* could not have been permitted to go into such an inquiry, the Plaintiff is also concluded. In saying this, I desire not to have it supposed that I put the rights of the Plaintiff as high as those of *Neale* would have been, but I am confident, at least, that he can stand no higher. Regarding then the case in this point of view, although I am by no means satisfied with what I see of the accounts of Mr. *Remnant*, and although I am also satisfied that Mr. *Taylor* had no means of judging of the propriety of the bills delivered, and that, in fact,

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James Neale, in the matter of these securities, was *inops consilii*, still, after an acquiescence of ten years in bills of costs and in an account stated, I should not allow *James Neale* to open such an account, unless actual fraud, such as intentional misrepresentation or concealment, were proved. But this, as I have already said, is already disposed of in this case. The result is, that the Plaintiff must take the accounts of the Defendant *Remnant* as he finds them settled by the Defendant *Neale*, and that he is not entitled now to open them or tax the bill of costs.

This brings me to the next question, which is one of difficulty and of considerable importance, viz. the position in which the Plaintiff's securities are to rank in the order of the securities affecting this estate, and to consider which question was the principal reason for postponing my decision. It follows, as a matter of course from what I have stated, that the Defendant *Remnant's* securities, which are prior in point of date, must at all events rank before the registered order of the Plaintiff on the 30th of *January*, 1841, and that consequently, at all events, *Remnant* must stand as the first incumbrancer on this property for the sum of 1,228*l.* and interest thereon, at 5*l.* per cent. per annum, from the 22nd of *January*, 1841.

The next question contended for by the Defendant *Remnant* is, that he is entitled to priority over the Plaintiff in respect of his subsequent securities, and that is contended for on two grounds; the first is, that the first security, viz. that of the 12th of *June*, 1839, was to secure 647*l.* and future advances, and that this will give priority to all subsequent advances, although made with notice of the charge of the Plaintiff; and secondly, on the ground that, according to the true construction
of

of the statutes 1 & 2 Vict. c. 110, and 2 & 3 Vict. c. 11, which creates the Plaintiff's charge, it bears date only as if created at the date of the second registration thereof, that is on the 30th of November, 1852.

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On the first point, I am of opinion that the Defendant *Remnant* is not entitled to stand as an incumbrancer on the estate before the Plaintiff, in respect of advances made subsequently to the registered order of the 30th January, 1841, of which he had full notice. The law with respect to the question whether a second incumbrancer who takes, subject to a prior mortgage expressed to secure a sum then due, and also future advances, is entitled to priority over the advances made subsequently to his security by the first incumbrancer with notice of such second incumbrancer, is a point not free from doubt on the authorities. The ground on which it is put, in favour of the first mortgagee who claims priority for his subsequent advances, is, that the second mortgagee might, by a tender of the amount due to the first mortgagee, have stopped all further advances; and the case of *Gordon v. Graham* (a) is cited, where Lord *Comper* held, that the second incumbrancer having, when he advanced his money, notice of the nature of the first mortgage, could not redeem the first mortgage without payment of the sum advanced by the first mortgagee after he had received notice of the second incumbrance. This decision has not met with the unanimous approbation of the profession. Mr. *Powell* (b), in his Treatise on Mortgages, doubts the soundness of the decision; and Lord *St. Leonards*, in *Blunden v. Desart* (c), says, that "even in the case of a first mortgage, whether legal or equitable, covering future advances, it deserves further consideration,

(a) 7 Vin. Ab. 52, pl. 3; 2 edit.), 534, n.; but see 4 Byth. Eq. Ca. Ab. 598. (2nd edit.), 427.

(b) *Powell on Mortgages* (6th (c) 2 Dru. & War. 405.

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consideration, whether it would be safe to rely, in all cases, upon *Gordon v. Graham*, as an authority that advances may be safely made after the first mortgagee has notice of a second mortgage."

This case of *Gordon v. Graham* has never, I believe, been treated as an authority for holding, that the doctrine applied to the case of a second incumbrancer, who advanced his money *without* notice of the first mortgage. Lord *Cowper* certainly relies on the fact of notice; for he observes, that "it was the folly of the second mortgagee, with notice [of the first incumbrance] to take such a security." This reasoning obviously fails to apply to the case of a second incumbrancer, who not only had no notice of the prior incumbrance, but who obtains his charge on the estate, not by reason of any contract with the owner, but by operation of law, which gives to the registered order to pay the effect of an incumbrance on the land, for a debt which the debtor had refused or was unable to pay to the creditor. Neither do I see, in the present case, how the Plaintiff could, by tender to *Remnant*, have stopped further advances to the Defendant *James Neale*. There is no proof before me of when the Plaintiff first became acquainted with the nature and extent of the lien claimed by the Defendant *Remnant*; nor, considering the feelings existing between these parties, does it appear to me probable that anything short of a suit in this Court could have obtained for the Plaintiff that information.

Upon the whole, I am of opinion, that independently of the questions which arise on the construction of the statutes to which I am next to refer, that the Defendant *Remnant* is not entitled to priority over the Plaintiff, in respect of what may be due to him for sums advanced
subsequently

subsequently to the 30th *January*, 1841, when he had notice of the Plaintiff's security.

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The next question is, whether under the provisions of the statutes 1 & 2 *Vict.* c. 110, and 2 & 3 *Vict.* c. 11, the judgment of the Plaintiff has not lost its priority. For this purpose the case may be thus stated:—On the 30th *January*, 1841, the Plaintiff registered his judgment against *James Neale* the father, and acquired a charge on his estate. On the 8th *January*, 1844, and when this judgment was in full force, the Defendant *Remnant* obtained a mortgage for 1,796*l.* then due to him. On the 30th *January*, 1846, the five years had expired from the date of the judgment being first registered, and no new register was made of it. It was revived, by a fresh registry of it, on the 30th *November*, 1846; that registry was again allowed to expire on the 30th *November*, 1851, and the judgment was again revived by a third registering of it on the 30th *November*, 1852, which is still in force.

By the 4th sect. of the stat. of 2 & 3 *Vict.* c. 11, it is enacted, "That all judgments," &c.; and by the 5th section it is enacted, "That as against purchasers," &c. The 2nd section of 3 & 4 *Vict.* c. 82, is as follows:—"Whereas," &c. I think it clear, on the construction of these clauses, that the previous registrations of this order are to be treated as nothing. It is true, that it was under the first statute a valid and subsisting charge, when the Defendant *Remnant* advanced his money or obtained his security; but it ceased to be any charge at all when the five years had elapsed, and it became, so far as regards his interest, exactly as if it had been paid off, and the registration again operates only as if a new judgment had been created and a new charge had been put on the land. Under the statute, therefore, I am of opinion

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opinion that the Plaintiff can only rank as an incumbrancer from the 30th *November*, 1852. The statute does not affect any right which the Plaintiff might have independently of its provisions, but except under the statute this order would have no effect on the land of *James Neale*.

The result is, that the Defendant *Remnant* must be treated as the prior incumbrancer, in respect of all mortgages created by *Neale* in his favour prior to the 30th *November*, 1852, and that I must make the usual decree of redemption as against a mortgagee in possession,—that is, take an account of what is due to Defendant *Remnant*, for principal and interest on the mortgage securities executed in his favour by *James Neale* prior to the 30th *November*, 1852, and take an account of rents and profits of the mortgaged premises received by him, and of his application thereof, in the usual way as against a mortgagee in possession, from the time of his taking possession thereof, and the usual redemption on payment thereof, and his costs of the suit. The Plaintiff must be at liberty to add what he shall have paid to *Remnant*, together with his costs to his debt, and there must be the usual decree of foreclosure against the other Defendants, in case they shall not pay this amount at the appointed time to the Plaintiff.

Liberty to apply.

NOTE.—In *Beavan v. The Earl of Oxford* (23rd *November*, 1855), it was held by the Lord Chancellor and Lord Justice *Turner* (Lord Justice *Knight Bruce*, *dubitante*), that the omission to re-register within the five years did not give priority to an existing *paisne* judgment. See also the recent statute of the 18 & 19 *Vict.* c. 15, s. 6.

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TURNER v. LETTS.

March 24.

THE testator, *George Richards*, bequeathed the residue of his estate, which consisted chiefly of leaseholds and shares, in trust for his wife for life, and after her decease upon trust for his daughters for their separate use for life, and afterwards for their children; and he appointed his wife and two others (who renounced) executrix and executors and trustees of his will.

A person can only give a lien on deeds as against himself and to the extent of his own interest.

In a suit to recover specific chattels, it is not necessary, as in *trover*, to prove a conversion.

The testator died in *November*, 1842, and the widow alone proved the will and enjoyed the property in *specie* without conversion till 1854.

A suit was instituted by persons entitled in remainder against the executrix (who was also the tenant for life) for the administration of the estate.

On the 31st of *January*, 1854, the suit of *Waeick v. Richards* was instituted by four of the testator's daughters (the present Plaintiff, *Mrs. Turner*, being one) against the widow, *Mary Richards*, and others for the sale and conversion of the property, and to carry the trusts of the testator's will into execution. In this suit, *Mrs. Richards* put in her answer, claiming to be entitled to enjoy the property in *specie*, but before the cause came on to be heard, and in *December*, 1854, *Mrs. Richards* died, having appointed the Defendant *Letts* and another executors of her will.

The executrix died pending the suit, and her solicitor claimed a lien for his costs on deeds relating to leaseholds which had been placed in his hands by the executrix.

On the death of *Mrs. Richards*, the Plaintiff, *Mrs. Turner*,

The Master of the Rolls was of opinion, that independ-

ently of the suit, the executrix could give no lien as against those in remainder, for costs for which she was personally liable, and that in the suit, the costs had been lost by the abatement, and therefore that no lien existed. But the Lords Justices considered, that the solicitor's lien depended on whether the executrix was or not indebted to the estate, and they put this in a train of investigation.

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Turner, one of the daughters of the testator, obtained letters of administration *de bonis non* to the testator's estate.

A bill of revivor and supplement was filed by the Plaintiffs in *Waeick v. Richards* (other than Mrs. *Turner*), but no legal personal representative of Mrs. *Richards* was made a party. A decree was made in both the original and supplemental causes to take the accounts as against Mrs. *Turner*, but not as against Mrs. *Richards* or her representatives.

The Defendant *Letts* was the solicitor of Mrs. *Richards* in the suit of *Waeick v. Richards*, and Mrs. *Richards* had delivered to him the title deeds and papers belonging to the testator's estate. *Letts* now refused to deliver them up to the Plaintiff Mrs. *Turner*, the administratrix *de bonis non* of her father, on the ground that he had a lien on them for his costs for business done for Mrs. *Richards* in the suit.

The Plaintiff, Mrs. *Turner*, thereupon filed her bill against *Letts* for the delivery of the title deeds.

Mr. *Follett* and Mr. *Macnaghten*, for the Plaintiff. Mrs. *Richards* sustained two characters; she was both tenant for life and executrix. As tenant for life, her power over the deeds did not extend further than her own interest in the property, which ceased on her death, and then both the estate and the deeds belonged to those in remainder, or to the Plaintiff, as representative of the testator. Though a solicitor has a lien on his client's own papers, *Worrall v. Johnson* (a), yet that lien is limited to the interest of the client in them, *Pelly v. Wathen* (b); for no one can give a lien on deeds to a
 solicitor

(a) 2 Jac. & W. 214. (b) 7 Hare, 351; 1 De G., M. & G. 16.

solicitor of a higher nature than the interest he himself has in the deeds; *Molesworth v. Robbins* (a).

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But it will be said, that she had power, as executrix, to give a lien. This may be true as against herself and her own interest, but it would be ineffectual, both as against the administratrix *de bonis non* and the persons who, at her death, became entitled to the estate, and who thereupon had a right to the muniments of title. The case might be different if Mrs. *Richards* had incurred costs in the general administration of the estate, or had a balance due to her, the right to which she might have transferred, but here the suit was adverse to her as tenant for life, and its object was, to obtain redress against her mal-administration of the estate, and to prevent her enjoying the leaseholds *in specie*. Nothing was due to her from the estate, but the contrary.

The employment of a solicitor by a trustee, in respect of the trust estate, gives him no lien, *Hall v. Laver* (b); nor can a solicitor refuse to deliver up, on the ground of lien, documents deposited with him for the mere purposes of a suit, and particularly where others have an interest therein; *Baker v. Henderson* (c); *Bell v. Taylor* (d); *Warburton v. Edge* (e); *Francis v. Francis* (f).

Mr. R. Palmer, Mr. Lloyd, and Mr. F. T. White, for Mr. Letts. There is a misapprehension of the principles and authorities applicable to this case, which has reference to documents in the hands of an executrix, relating not to real but to the personal estate alone, over which an executrix has the complete control. The will itself

(a) 2 Jones & Lat. 358.
(b) 1 Hare, 571.
(c) 4 Sim. 27.

(d) 8 Sim. 216.
(e) 9 Sim. 508.
(f) 2 De G., M. & G. 73.

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itself empowers the executors to retain and reimburse themselves all costs, &c. which they may be put to in the execution of the trust. But quite independent of this power, an executor, if he incurs costs in the execution of his office, may alien a portion of the personal estate for their payment; he has an absolute power of disposition over the whole personal assets (a); he may pledge or mortgage them, and even give to a mortgagee a power of sale; *Russell v. Plaice* (b). If he can sell or mortgage to pay costs, he can equally create a valid lien for the same purpose, or to secure them. If he incur costs, he has a right to retain the assets and the deeds until payment, and his solicitor has an equal right.

But this is the suit of the personal representative of the testator, and the Plaintiff represents the same interest as Mrs. *Richards*. She has succeeded to the office of and stands in the same situation as Mrs. *Richards* herself, and she is bound by the same obligations, unless Mrs. *Richards* has been guilty of some breach of trust. If, therefore, Mrs. *Richards* could not obtain the deeds from Mr. *Letts* without payment of his costs, so neither can the Plaintiff.

It is said, that Mrs. *Richards* has established no claim or lien on the estate in the suit of *Waeick v. Richards*. The answer is, that the present Plaintiff has, by the decree obtained by her, prevented the account being taken as regards Mrs. *Richards* or her representative. They have been waived, and the account directed by the decree is merely of the personal estate come to the hands of the present Plaintiff, and what part is outstanding. In truth, a general account could not be taken

(a) 1 *Williams on Executors*, Chap. I.
 (4th edit.), Part II., Book I., (b) 18 *Beav.* 21.

taken in the absence of a full legal personal representative of the testator, and there was a mere administrator *de bonis non* before the Court in the suit.


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Lastly, the suit is in the nature of an action of *trover*, and no conversion has been proved, which, at law, would be essential to support such an action. *Beames on Costs* (a) was also cited.

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I am of opinion, in this case, that the Defendant has no lien upon these deeds. It is quite settled, both by principle and authority, that no person can give a lien upon deeds, as against another person; he can only give a lien as against himself, and to the extent of his own interest. In this case, Mrs. *Richards* undoubtedly has given a perfectly good and complete lien to Mr. *Letts*, as against herself, and she could not obtain these papers from Mr. *Letts* without paying him everything which he was justly entitled to as her solicitor. After her death, Mr. *Letts* was still entitled to any lien upon these papers which the executrix had as against the Plaintiff; but, in my opinion, she had none. The burden of proof lies upon the Defendant to make out his lien; and independently of the suit of *Waeick v. Richards*, and what took place in it (the effect of which I shall presently consider), the case is the same as if the lien had been created by the executrix in favour of a mere stranger. Suppose Mrs. *Richards* to be still alive, but by reason of some event that had happened, her interest in the estate had ceased, these deeds and papers which relate to property of which she was tenant for life, with remainder to the Plaintiff and other persons, for whom the Plaintiff is now trustee, they would properly have been in the custody of the executrix, so long

(a) Chapter IV.

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long as she was tenant for life, but when her interest ceased, they belonged to the persons who then became entitled to the property. If she were still alive, the question would be this :—What lien has she upon these papers? and it would be essential for Mr. *Letts* to show that she had still a lien upon them, as against the Plaintiff.

It has been argued, that there is, in point of fact, in the Plaintiff a mere continuance of the estate and character of the legal personal representative of the original testator. That is so, but the debt which was due from the executrix to Mr. *Letts*, was not due from her in her character of executrix, but was due from her personally; and whether she had assets or not of the testator, she would have been bound to pay every penny to Mr. *Letts*, and he would have a right to sue her personally, whether she had any assets or not. No doubt, in one sense, the debt was incurred by proceedings relative to her office of executrix, but it was not a debt due from her in her character of executrix or legal personal representative; for if so, she would only have been liable to the amount of assets which she had received, but she in point of fact was personally liable for the whole amount due.

I will assume, in favour of Mr. *Letts*, that if the suit of *Wueick v. Richards* had proceeded to a decree, Mrs. *Richards* would have been entitled to her costs. But in what way could those costs be now obtained for Mrs. *Richards's* estate? The legal personal representative could not revive the suit for the purpose of obtaining them. It is the rule of the Court, which in a great many cases may work considerable injustice, that you cannot revive for the purpose of obtaining costs. The legal personal representative of Mrs. *Richards*, therefore, would have no means of obtaining those costs

costs after her death. If the costs of that suit formed part of Mrs. *Richards's* estate, I do not hesitate to say, that Mr. *Letts* would be entitled to a specific lien upon them, and that the legal personal representative of Mr. *Richards* might have been entitled to retain the deeds until the costs had been paid, which might have created a lien in favour of Mr. *Letts*; but I see no means by which those costs can be made part of Mrs. *Richards's* estate, or by which her legal personal representatives could recover them. The case, I think, cannot stand differently from what it would if Mrs. *Richards* were now alive, and the suit were discontinued and her interest in the estate had determined. In that case, the persons in remainder would be entitled to recover those deeds and papers; but if she had a lien upon them in respect of any costs, she would be entitled to retain them for that purpose, and Mr. *Letts* would stand in her place; but no costs would be due to her.

I also consider that the institution of a suit makes no difference in that respect. If I am right in this,—(which is the principle and foundation of my decision,) that this is a personal claim of Mr. *Letts* against Mrs. *Richards*, and simply against her estate; and that consequently she could give no lien upon the deeds, other than that which she herself possessed; that the burden of proof lies upon Mr. *Letts*, and that he has failed in proving any such lien.

It has been suggested, that if this were an action at law, it would be necessary to prove conversion; that is, a resistance to deliver up the documents sought to be recovered. That is so at law, but in equity the Court looks at the case made by the Defendant; it is not necessary to apply to a Defendant before a suit is instituted; but if the Defendant says, "If you had applied to me, I should not have contested your claim," then, undoubtedly,

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undoubtedly, he gets the costs of it; but if it appears that an application would have been useless, and that the Defendant resists at the hearing, the Court looks at the case exactly in the same point of view as if that right had been insisted upon before the bill had been filed; and in fact that is what has taken place in this particular case. That this is a case of great hardship against Mr. *Letts*, I think no one can doubt; because Mr. *Letts* has been honestly employed in using his exertions for the benefit of a client, with relation to a suit, which seems to have been conducted in raising points which might have affected Mrs. *Richards*; and though I express no opinion as to what the result of the suit would have been, or whether she would have been entitled, if it had been ultimately decided, to the costs of the suit; yet, in the result of what has happened, Mr. *Letts* is debarred from claiming the costs of that suit, except against the estate of Mrs. *Richards*, and, by reason of the discontinuance of it, it cannot now be ascertained whether these costs could be claimed by her against the present owners of these deeds.

I have already determined, in a case in which I gave judgment yesterday (*a*), that a solicitor does not acquire a lien upon an estate recovered in the suit. That is totally distinct from the question of having a lien upon papers created by the client himself.

I am therefore of opinion, in this case, that there is no lien upon these papers, and that they must be delivered up to the Plaintiff, and the Defendant must pay the costs of suit.

(*a*) *Shaw v. Neale*, ante, p. 157.

NOTE.—Upon appeal to the Lords Justices (28th May, 1855), they considered, that if the deeds were in the hands of the widow, they could not be taken out of her possession without indemnifying her from the costs of the suit instituted against her. But as it was alleged that she was a debtor to the estate, they held that that fact must be investigated and that the question of law must stand over.

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HUGHES v. ELLIS.

March 1.

THE testator, by his will, dated in 1823, expressed himself as follows:—"I direct that all my just debts, funeral expenses, the expenses of proving this my will, and all other expenses attendant thereon be first paid by my executrix, hereinafter named, out of my personal estate, and from and after the payment of the same, I give and bequeath the remainder of all my personal estate and effects, of what nature or kind the same may be, in manner following: *videlicet*—I give and bequeath to my mother, *Anne Davies*, the sum of one shilling. Also, I give and bequeath to my brother *Hugh*, and my sisters, *Margaret, Anne, Elizabeth, Sarah* and *Mary*, each the sum of one shilling; I give and bequeath to my dear wife *Mary*, the rest, residue and remainder of all my estate, whether leasehold, real or personal, of what nature, kind or quality soever the same may be, *and to her executors, administrators and assigns*. But if my said wife should die intestate, then my will is, that the said remainder of my estate shall be bequeathed to my nephew *David Hughes* (son to my brother *William*), and to *Margaret Evans* (niece of my wife's first husband), share and share alike, their heirs and executors." He appointed his wife sole executrix.

A testator bequeathed his residuary estate to his wife, "her executors, administrators, and assigns," but if she died intestate, then his will was, that it should be bequeathed to *A. and B.* The wife predeceased the testator. Held, (independently of that circumstance), that the gift over, after an absolute interest, was void.

Mary Hughes, the wife of the said testator, died intestate, on the 16th of *September*, 1854, in the lifetime of the said testator, and who died on the 23rd of *October*, 1854.

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The Plaintiff *Margaret Hughes* (formerly *Margaret Evans*) by this bill claimed a moiety of the testator's residuary estate, under the bequest over to her and *David Hughes*.

To this bill the Defendants Mrs. *Ellis* and Mrs. *Parry* demurred.

Mr. *Eddis*, in support of the demurrer. There is a distinct absolute gift of the residue to the wife, and to her executors, administrators *and assigns*, in the first instance, with a gift over, if she should die intestate; that is, if she should not dispose of it. This gift over is void, being inconsistent with the prior absolute gift. In *Ross v. Ross* (a), there was an absolute gift to A., with a gift over, if A. "should not receive or dispose of it by will or otherwise." This limitation was held void; "for," observed Sir *Thomas Plumer*, "if you give absolute property to a person, you cannot subject it, for his life, to a proviso, that if he does not spend it his interest shall cease" (b). So in *Green v. Harvey* (c), there was a bequest of a leasehold house to R., with a gift over, "should he die without heir or will," the gift over was held void, Sir *James Wigram* observing (d), "It has been repeatedly decided, that where a legacy is given absolutely, and a gift over is super-added, in the event of the legatee dying without having disposed of his legacy, the gift over is void and the legacy is absolute."

Again, the wife having died in the testator's lifetime, both the gift to her and the gift over have lapsed; her dying "intestate" could not have reference to her death
 in

(a) 1 *Jac & Walker*, 154.
 (b) 1 *Jac. & Walker*, 158.

(c) 1 *Hare*, 428.
 (d) 1 *Hare*, 431.

in the testator's (her husband's) lifetime, for on her death during coverture she must necessarily have died intestate.

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Mr. *Freeling*, *contra*. By the general rules of construction, where the latter part of a will is inconsistent with a prior part, the latter will prevail; *Sherratt v. Bentley* (a); *Morrall v. Sutton* (b); and the general intent must prevail against particular terms to the contrary; *Crone v. Odell* (c); *Sherratt v. Bentley* (d). Here the general intent is in favour of *Daniel Hughes* and the Plaintiff, and to give effect to it, either the estate of the widow, her executors and administrators and assigns, must be cut down to a life interest with a testamentary power of appointment, or the word "executors" may be construed "devisees." In that view the cases cited do not apply, and the limitation over is perfectly valid.

The intestacy has always reference to the death of the person whose death intestate is referred to; *Edwards v. Edwards* (e). There is no lapse, and if there be, it is only of the wife's life interest. In *Doe d. Stevenson v. Glover* (f), there was a devise to A. in fee, and if he died without leaving issue, or if he did not "dispose or part with" the property, over to B.; it was held that the gift over was good. The present gift over would be valid as an executory devise. [*The Master of the Rolls*. I assume there is no real estate.] Effect is to be given to every part of the will, and if any part must necessarily be rejected, it would be doing less violence to reject the words "executors, administrators and assigns," than to make the whole of the gift over void.

The

(a) 2 *Myl. & K.* 149.

(d) 2 *Myl. & K.* 157.

(b) 4 *Beav.* 478; 5 *Beav.*

(e) 15 *Beav.* 357.

100; 1 *Phill.* 533.

(f) 1 *C. B. R.* 448.

(c) 1 *Ball & B.* 470.

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My opinion of this will is, that the testator intended to give his wife an absolute interest in this property, with the power of absolutely disposing of it either in her lifetime or by will. If she did not dispose of it in her life or by will, he then intended these gifts over to take effect. No doubt the result is, that the gifts over could not take effect, for the wife took an absolute interest, and if she died without a will, the residue would go to her next of kin. She died, however, in the life of the testator, and I am of opinion that a lapse took place; the testator might have said "intestate in my life," but the simple word "intestate" excludes the construction that the gift over was intended by the testator to provide against a lapse, because if she had died in his lifetime, being a *feme covert*, she had no power to do any testamentary act, by making a will, and she therefore must necessarily have died intestate.

I am of opinion that he intended to give her an absolute interest in the property, and if she did not dispose of it by will, the gift over was to take effect, and both upon principle and on the authorities which have been cited, such a gift over could not take effect.

The difficulty has been created by the testator, his estate ought, if possible, to bear the costs.

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1855.

*In re* SMITH'S WILL.

Jan. 30.

Feb. 15.

THE question on this petition turned on the construction of the will of *Samuel Smith*, dated the 13th of *January*, 1836.

A testator gave a legacy to trustees for the maintenance of *A.* and *B.* during their minority, "and when and so soon as the youngest child should have been born twenty-one years," to "pay and divide" it between them, if they should then both be living. But if either of them should be then dead, then he gave his moiety over to other persons. They both died before the youngest would, if living, have attained twenty-one, but *A.*, the eldest, had attained that age. Held, that *A.* took a vested interest, and that his representatives were entitled to a moiety.

By it, he gave 3,000*l.* to two trustees, in trust to apply the dividends for and towards the maintenance, education and support of *Samuel Steele* and *Charles Steele*, his two illegitimate children by *Elizabeth Steele*, during their minority, and towards the maintenance and support of the said *Elizabeth Steele*, during such minority, if his trustees should think proper. The testator then stated, that the interest in this bequest was to be entirely subject to the discretion of his trustees, to expend either the whole or a part of it for this purpose, or to lay out any sum, not exceeding one-third of the dividends, for the support of *Elizabeth Steele*.

The will then proceeds in these words:—"And when and so soon as the youngest of my said two children shall have been born twenty-one years, I direct my said trustees, or the survivor of them, his executors or administrators, to pay and divide the whole of the said principal sum of 3,000*l.* equally between them my said

two

and that his representatives were entitled to a moiety.

## DATES.

1837. Testator died.

1839. *Charles* died.1854. *Samuel* attained twenty-one and died.

1856. *Charles*, if living, would have attained twenty-one.



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two children, share and share alike, if they shall *then* both be living; but if either of them shall be then dead, I then give and bequeath the moiety of such deceased child, equally between such of the children of my late sister *Mary Bushell*, as shall live to attain twenty-one, their executors, administrators and assigns, respectively. And as to all the rest and residue," &c., "to my brother *William Smith* and my sister *Emma Smith*."

The testator died in 1837, leaving the two sons and their mother surviving him. The youngest son *Charles* died in 1839, at the age of four years. If he had lived, he would have been twenty-one years of age on the 3rd of *March*, 1856. The eldest son, *Samuel*, attained twenty-one on the 8th of *August*, 1854, and he died on the 26th of *September* following, and consequently before the day had arrived when *Charles* had been born twenty-one years. He made a will, bequeathing his interest in this fund to his mother.

This petition was presented by the mother and legal personal representative of *Samuel*, claiming one moiety of the fund, as vested in him on his attaining twenty-one years. The children of *Mary Bushell* claimed both moieties of the fund, on the ground that it was given over to them, if neither of the two legatees was alive at the time when the younger of them had been born twenty-one years. The residuary legatees also claimed this moiety as lapsed.

Mr. *R. Palmer* and Mr. *Colt*, in support of the petition. The bequest, in this case, is vested. It comes exactly within the principle of *Leeming v. Sherratt* (a), where

(a) 2 *Hare*, 14.

where there was a direction to "pay and divide" unto and equally among the testator's children, "as soon as the youngest child should attain the age of twenty-one," and it was held, that a child, who attained twenty-one, and died before the youngest attained twenty-one, took a vested interest. There is a postponement of the period of division, but not of the vesting; the gift of the intermediate interest shows it. The word "then" does not import contingency in the gift itself, but only refers to the time when the gift, already vested in interest, is to come into possession. The case comes within the class of cases stated at length in 1 *Rop. Leg.* (a). They cited also *Gooch v. Gooch* (b); *Saunders v. Vautier* (c); *Boraston's case* (d); and cases in 1 *Jarm. Wills* (e).

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Mr. *Bagshawe* and Mr. *Doria*, for the children of *Mary Bushell*. The will, in the first instance, confines itself to the income of the fund and to the minority of the two children. Then follows the clause which deals with the capital, and has given rise to the present question. There is no gift of the capital, except in the direction "to pay and divide" it at a particular period, and it is clearly settled that, under such a form of gift, no person can take any interest in the fund, unless he be living at the period of division, the vesting being postponed until after that event has happened (f). In addition to this, here the division is only to take place "if they should then be both living;" and besides, there is an express gift over, "if either of them should be then dead," and the same result must follow if both be then dead. If *Charles* were now living and *Samuel* dead, it is clear that *Samuel's* share would belong to the

(a) Page 619 (edit. *White*).(b) 14 *Beav* 565.(c) *Cr. & Phill.* 240.(d) 3 *Rep.* 15b.

(e) Pages 734, 764.

(f) See *Leake v. Robinson*, 2 *Mer.* 387.



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the children of Mrs. *Bushell*, and that *Samuel's* representatives would take nothing. How then can the case be altered by the death of *Charles* in the meanwhile? This case differs entirely from *Leeming v. Sherratt*. There there was a gift to a class and not to named individuals; and besides, in that case, there were no such expressions as these:—"if they should be then living," "but if either of them should be then dead."

*Samuel*, therefore, not being alive on the 3rd of *March*, 1856, the event never happened, on which alone he was to take, and the share intended for him went over to the children of *Mary Bushell*. They cited *Monkhouse v. Holme* (a); *May v. Wood* (b); which were both cited in *Leeming v. Sherratt* (c).

Mr. *Piggott*, for the residuary legatees.

Mr. *J. V. Prior*, for the trustees.

Mr. *R. Palmer*, in reply, referred to *Saunders v. Vautier* (d), and *Parker v. Sowerby* (e), and contended that the words "shall have been born twenty-one years," meant the termination of the minority of *Charles*, and not a certain day in 1856, and that *Samuel's* share vested.

The MASTER of the ROLLS reserved judgment.

The

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(a) 1 Bro. C. C. 298.  
(b) 3 Ero. C. C. 473.  
(c) 2 Hare, 14.

(d) Cr. & Ph. 240.  
(e) 1 Drew. 488.

*The MASTER of the ROLLS.*

The principle applicable to these cases is now settled, and according to this principle, as recognized in *Saunders v. Vautier* (a) and *Leeming v. Sherratt* (b), I think no doubt can now be raised, but that if a testator gives a sum of money to trustees, and directs them to apply the interest for the benefit of legatees during their minority, and then directs the money to be divided between them, on the youngest attaining twenty-one, with a gift over of the share of one who dies before that period, this constitutes a legacy *debitum in presenti*, but *solvendum in futuro*, and that any child who attains twenty-one acquires a right to the payment of his share.

The difficulty arises, in this case, from the peculiar expression used by the testator, who, instead of saying "when the younger child attains twenty-one," makes the gift over of the share of a child take effect, if that child die before the period when the youngest of the two children shall have been born twenty-one years; and this expression, it is urged, is different from the form usually employed in such cases, and is such as to prevent the application of the rule I have referred to, and makes the gift over take effect wholly irrespective of the consideration whether the younger be then alive or not.

I cannot but admit that I have felt considerable embarrassment in the case; but, taking the whole will together, and considering the great importance of not breaking in upon an important rule of construction, I have

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(a) *Craig & Phill.* 240.(b) 2 *Hare*, 14.

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have come to the conclusion, that the testator has not expressed any intention, that the son who had attained twenty-one should forfeit his share, because he died before the younger child attained twenty-one. I think that these were vested legacies, to be paid to them when the younger child attained twenty-one, but liable to be divested in case either child died before he became entitled to payment.

In *Saunders v. Vautier* (a), the testator directed the legacy to accumulate till the legatee attained twenty-five, and then directed the trustees to transfer the fund to him. The Court gave the legatee maintenance out of the interest, and held, that on his attaining the age of twenty-one years, he was entitled to a transfer of the capital. Here the testator has expressly directed the interest to be applied to the maintenance of the legatee.

In *Leeming v. Sherratt* (b), the testator directed the residue of his freehold and personal property to be sold, and the produce divided amongst all his children, so soon as the youngest attained twenty-one, and in case of the death of any of the children leaving issue, he gave to such issue the share of the parent. The Court held that legacy to be vested in the sons who had attained twenty-one, but who died before the youngest child attained twenty-one.

In this case, if there had been no gift over, it would, I think, have been impossible successfully to have contended that these legacies were not vested, at once, on the death of the testator, although the payment was postponed till a later period. The difficulty arises on the terms of the gift over. I am of opinion that this

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(a) *Craig & Phill.* 240.(b) *2 Hare*, 14.

is a gift over, not if one child die before a particular day, as the 25th of May, 1856, assuming that to be the day on which the youngest son would have been born twenty-one years, but that it is a gift over, in case, when the period of payment arrives, one of the children shall have previously died. I think that the period when a child was entitled to demand payment, was on attaining the age of twenty-one years. If there had been no gift over in this case, *Saunders v. Vautier* is a clear authority for holding that the son *Samuel* would have been entitled to receive payment of his share on attaining twenty-one. It was a vested legacy, the interest of which was to be applied for his maintenance during his minority. What was to become of the interest, during the interval which would elapse between the day when he attained twenty-one and the day on which his brother was to attain twenty-one? It differs in no respect from a direction to pay it to him at twenty-five, which was the case in *Saunders v. Vautier*, unless it be more favorable in favour of the vesting in the case before me.

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If both the sons were now alive, and there had been no gift over, I should not, in the views I take of this case, have hesitated in ordering payment to *Samuel* of his moiety, although *Charles* was still an infant. If this would be so, in case there was no gift over, does this addition of this gift over disentitle him to receive payment of his moiety? I think not, for the reasons I have already stated, as to the true construction to be put on the terms of the gift.

I am of opinion that this gift to the children of *Mary Bushell* is expressed to take effect in the event of a legatee dying before his share became payable to him, that is, in the event of his dying under twenty-one.

I am

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I am also of opinion, that I should be weakening an important principle of construction, and giving too much weight to the peculiar expressions used in this will, viz. the words "when and so soon as the youngest of my said two children shall have been born twenty-one years," if I were not to treat these words as, in substance, equivalent to the words "when my youngest son shall have attained the age of twenty-one years."

Had the testator's intention been different, he ought to have directed the legacy not to be vested before a fixed day, and that if the legatee died before that day, his legacy should go over to the children of *Mary Bushell*.

This disposes of the claim of the residuary legatees. In my opinion, *Samuel* was entitled to receive his share on attaining twenty-one, and his mother, as his legal personal representative, is now entitled to receive it. I will make an order for the payment of it to her, as his legal personal representative. The costs of all parties must be paid out of the fund.

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1855.

BROCKLEBANK v. JOHNSON.

Feb. 21.

March 19.

**T**HE testator devised his real and personal estate to trustees, upon trust, to convert and invest, and pay the income to his daughter, *Betty Jones*, for life. And after the decease of his daughter, he directed his trustees to sell his messuages in *Netherfield*, and the money arising therefrom, together with the rest of the money vested in them, to "call in and equally pay, distribute and divide, unto and amongst all and every the child or children of my said daughter *as shall be then living*, if more than one, or if there shall be only one such child, then unto such child only, *provided all such children may then have attained the age of twenty-one years*. But if such child or children shall not have attained the age of twenty-one years, at the time of my said daughter's decease," then he directed the money to arise by such sale to be invested, "and the interest, dividends and annual produce thereof, and of the rest of the money so to be placed out at interest, as therein before

The testator devised his real and personal estate to trustees to convert and invest, and pay the income to his daughter for life, and after her decease, to divide the fund among "all her children then living," provided all such children may then have attained twenty-one; if not, he directed the fund to be placed out at interest, and the interest, &c. to be applied for the maintenance

and bringing up of all such children, until the youngest should attain twenty-one, when the fund was to be divided amongst such children as should be then living, and the issue of such of them as should be dead, the issue to take their parents' share. Held, that a child who survived the mother, attained twenty-one, but died before the youngest attained twenty-one, took an absolute vested interest.

In construing a will, if two passages in it are directly opposed to each other, the latter will prevail; but where there is a mere inconsistency, the Court will endeavour to discover, from the whole, the real meaning of the testator, and, if possible, reconcile all its parts.

DATES.

1820. Testator died.

1840. *Betty* died.

1841. *Henry* died, having attained twenty-one.

1852. Youngest child attained twenty-one.



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 BROCKLEBANK  
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before directed, to be paid and applied for and towards the maintenance," &c., "of all and every such child, until the youngest of them shall have attained the age of twenty-one years; and when and so soon as the youngest of such child or children shall have attained the said age of twenty-one years, then upon trust, that they, my said trustees and executors," &c. "do and shall pay, transfer, distribute and divide the money to be raised, as aforesaid, with so much of the balance remaining in his or their hands, as shall not have been paid, laid out and expended, for and towards the maintenance," &c. "of all and every such child or children, unto and equally between and amongst all and every *such child or children as shall be then living*, and the issue of such of them as shall be then dead; save that such issue shall only take and be entitled to such part or parts thereof as the parent of such issue would by this my will have taken or be entitled to if living."

The testator died in 1820, and his daughter died in 1840, leaving six children, some having attained twenty-one and others not. The youngest of such children attained twenty-one in 1852, but, in the meanwhile, one of them, *Henry*, attained twenty-one, and died without issue in 1841, having, in 1838, sold his share in the residuary estate to an Insurance Company represented by the Plaintiffs.

The other five children contended, that as *Henry Jones* did not live until the youngest child of *Betty Jones* attained twenty-one, his assignees took no interest in the residuary estate.

The Plaintiffs, however, submitted, that *Henry*, having survived his mother and attained twenty-one, had acquired a vested and transmissible interest.

The


**The Solicitor-General** (Sir *R. Bethell*) and Mr. *Cairns*,  
for the Plaintiffs. When a provision is made for children,  
the Court leans to that construction which gives them a  
vested interest, and especially at the time at which they  
most require it, namely, on attaining their majority. It  
will therefore, in this instance, endeavour to put a  
rational construction on the will, and, if possible, give a  
share to all the children living at the daughter's death.  
In the first place, before examining the construction of  
this will, look at the palpable absurdity which the view  
taken by the other side involves; it does or might lead  
to a total intestacy, for suppose there were six children  
at the death of the daughter, but five of them should  
attain twenty-one and die before the youngest, and then  
that the youngest should die before attaining twenty-  
one, the whole bequest would be defeated. So that  
although, if all the children should have attained twenty-  
one, at the death of their mother they were all to have  
their shares then paid, yet if only one should be under  
that age, the whole is to be in suspense, and perhaps fail,  
owing to the mere personal disability of the sixth child  
to give a receipt for his share. The canon of construc-  
tion applicable to this case is given in a variety of cases,  
but it is well expressed by the Master of the Rolls in  
*Crozier v. Fisher* (a), where he observes, that "the Court  
would not, unless forced by the plainest words, adopt a  
construction by which the interest of a child of full age,  
and settled in life, would be divested, if it happened to  
die before the youngest child attained twenty-one."

We contend that *Henry Jones*, on the death of his  
mother, took one-sixth part of the fund absolutely. In  
the first place, the direction is to pay to "all the chil-  
dren at the death of the daughter, provided all had at-  
tained twenty-one." Those words do not make the gift  
depend

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(a) 4 Russ. p. 401.

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depend upon all attaining twenty-one, but the direction in effect is this:—first, “you are to pay all who have attained twenty-one;” but, secondly, “if all such children shall not have attained twenty-one, you are to place out their money at interest, and support the infants;” this and all that follows is applicable to those children only who might be infants at the death of the daughter, and to them only. The whole is plain and intelligible, if you read it thus:—“but if any of such children shall not have attained twenty-one,” then invest their shares. The word “money” thus directed to be invested does not mean the whole of the money produced by the sale, but the money which, but for their infancy, would be payable to the infants, and which could not be parted with under the anterior direction; and the words “to be paid and applied for and towards the maintenance,” &c. “of all and every such child,” &c., mean, not the adult children, but the class of minors only, who are respectively to be maintained, &c. till the youngest attains twenty-one; and so soon as that event happens, the ultimate distribution is to take place. By this construction, effect is given to the whole of the will, no violence is done to any part, and the class comprised in the words “if all such children shall not have attained twenty-one,” &c., would be a subordinate class. The Plaintiffs might, if necessary, contend, that any one who attained twenty-one became entitled to take; but that is not necessary, and the limited proposition contended for is this:—that the children who survived the daughter and attained twenty-one became entitled to an absolute vested interest. If this were not so, it would have been sufficient, according to the construction contended for by the Defendants, to have simply directed a division to be made when the youngest should have attained twenty-one; but the testator has directed it at the daughter’s death.

death. They cited *Howgrave v. Cartier* (a); *Bouverie v. Bouverie* (b); *Leeming v. Sherratt* (c); *Saunders v. Vautier* (d); *Chaffers v. Abell* (e).

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Mr. R. Palmer, and Mr. J. V. Prior, *contrà*. It is impossible to overcome the express directions of the will, that the division is only to be made on the daughter's death, "provided all such children might have attained twenty-one;" and if not, then the division is to be made, "when and so soon as" the youngest should have attained twenty-one, amongst *all such children* "*as should be then living*." This very principle is laid down in the case referred to by the Solicitor-General, as containing a canon of construction favourable to his view of the question. The Court is asked to disregard the testator's express words, on the ground of an intention resting on presumption only, but there are no words expressive of any such intention, and the directions to the contrary are clear and unambiguous. It is even conceded, that if there be a statement in a will which is ambiguously expressed, the Court will lean to that construction which will give a vested interest, at the time when the children are most in need of it. But here there is no ambiguity, one of these children might have attained twenty-one and died in the lifetime of the daughter, and yet he would not take, even if he had left issue.

What then is the construction of the words "provided all such children may then have attained twenty-one," &c.? It is said that they mean "if all have attained twenty-one, they are to be paid their shares, but if not, then such only as have attained that age are to be paid." Undoubtedly the literal construction makes the

(a) 8 Ves. & B. 79.

(b) 2 Phill. 349.

(c) 2 Hare, 14.

(d) *Craig & Phill.* 240; 4 Beav. 115.

(e) 3 Jur. 577.

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the payment contingent on the event of all having attained twenty-one, and the subsequent passages place it beyond doubt. But assuming that the gift is not contingent, why does the testator direct the trustees to convert and place out the whole of the money at interest, and maintain "all" the children? There is the first difficulty to be met by the other side. They say that this does not mean all the money, but only that part of it which belonged to the infant children; but "the money to arise by such sale" must mean *all* the fund; and it is to be applied to the maintenance, &c. of *all and every* such child, &c. till the youngest attains twenty-one. The gifts for maintenance, &c. continue to have effect after the children attain twenty-one, and if the construction be as contended for by the other side, that the division was to take place *toties quoties*, as each attains twenty-one, there would be nothing to *divide* on the youngest attaining twenty-one, as he would be then entitled to the whole remaining fund, but a division is undoubtedly then contemplated. The construction contended for by the Plaintiffs requires words to be supplied, but there is a numerous class of cases cited in 1 *Jarman on Wills* (a), showing that the Court does not introduce words to help out the meaning. There are, in fact, two contingencies; first, if all the children at the daughter's decease had attained twenty-one; and secondly, if at her decease, all had not attained twenty-one, and the testator intended the objects of the gift to be different in the different events. The Marquis of *Bute v. Harman* (b); *Boreham v. Bignall* (c); *Newman v. Newman* (d); *In re Smith's Will* (e), were cited.

The *Solicitor-General*, in reply.

The

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|--------------------------------------|---------------------------|
| (a) Page 771.                        | (c) 8 <i>Hare</i> , 131.  |
| (b) 9 <i>Beav.</i> 320, corrected in | (d) 10 <i>Sim.</i> 51.    |
| 16 <i>Beav.</i> 166.                 | (e) <i>Ante</i> , p. 197. |

*The MASTER of the ROLLS.*

I shall take some time to consider this case.

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*The MASTER of the ROLLS.*

March 19.

The question is, whether the shares given to the children of the testator's daughter vested in all those who survived their mother, or whether the estate is divisible amongst such of them only as were alive when the youngest attained twenty-one, either by reason of the interests not having vested till that time, or by their having become divested by their death before the youngest attained the age of twenty-one.

The first part of the clause gives a clear vested interest to the children who survived their mother. I think that the next words, "provided all such children may then have attained the age of twenty-one years," do not delay the vesting, but that they are merely expressive of the testator's desire that the legacies should not be paid till the youngest child should attain twenty-one, but that the shares of the children were to be ascertained at the death of the mother.

Such being my opinion upon the construction of these words, I must hold that the legacies remain vested, unless I find words in the other parts of the will to destroy the vesting in the first part of the clause. The passage which immediately follows is confirmatory of this construction, for it directs the interest, dividends and annual proceeds to be paid and applied for and towards the maintenance, support and education of all and every such child and children, until the youngest of them should attain the age of twenty-one years. Assuming

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ing two or three of them had not attained twenty-one at their mother's death, the whole income would then have been applicable to the maintenance, education and support of all the children, including those who might have attained their majority, until the youngest of them attained twenty-one ; for I apprehend that, under these words, an adult child who survived his mother would, in my view of the case, be entitled to receive an aliquot share of the income (a), as undoubtedly he would, if he were an infant at the death of the testator's daughter, and attained twenty-one before the youngest died.

The subsequent passages, I admit, appear inconsistent with the view I have already expressed. The will proceeds thus :—" And when and so soon as the youngest of such child or children shall have attained the age of twenty-one years," then upon trust to pay and divide the money " amongst all and every such child or children as shall be then living, and the issue of such of them as shall be then dead," the issue to take their parent's share. It cannot be denied, that these words are difficult to be construed, consistently with the previous clause ; but I am unable to give a consistent view to the whole will, if I reject the conclusion to be drawn from the first part of it. If the latter part of the clause were to prevail, the result would be, that if a child died, leaving children, before the testator's daughter, and, at her death, all the other children had attained twenty-one, the grandchildren would be excluded ; but if one only of the children was an infant, then the grandchildren might take ; this is, in my opinion, an inconsistent intention to attribute to the testator.

It is urged, that if two passages in a will are inconsistent, the latter is to prevail. This, no doubt, is true where

(a) *Badham v. Mox*, 1 R. & M. 631.

where two passages are directly opposed to each other (a); but where this is not so, and there is a mere inconsistency, it is the duty of the Court to endeavour to discover, from the whole will, the real meaning of the testator, and, if possible, to reconcile all its parts.

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What the testator, in my opinion, meant, was this :— that all the shares should vest upon the death of the daughter, but that the shares should not be actually paid until the youngest attained twenty-one, and that those children who had attained twenty-one should be allowed to enjoy the interest upon their shares; although the words of the will are, that it is to be applied to their maintenance, education and support, and that if they died leaving issue, their shares should go to their representatives. The passage which alludes to accumulation of the shares, does not, in my opinion, prevent my coming to this conclusion. The reported cases afford no assistance. The will is very obscurely worded, and I have had very considerable difficulty in coming to a conclusion. The first part of the will is not reconcilable with the latter part; but I have given the balance of my opinion in favour of the earlier passage, which is more distinct and clear as to its meaning, and also because, in cases of doubt, the Court leans to that construction which leads to an early vesting. I must therefore hold that *Henry* took a vested interest.

(a) "*Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est.*" *Co. Litt.*

112 b; and see *Sherratt v. Bentley*, 2 *Myl. & K.* 149.



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*In re BLAKEMORE'S Settlement.**March 26, 27.*

Limitations of a term to trustees, upon trust to raise portions for the children of A. surviving A. and B., "to vest in and to be paid and payable to" them at their ages of twenty-four years, with maintenance, &c. in meanwhile, out of the expectant or presumptive shares, and a gift over on the death of all before their shares should become vested. Held void for remoteness.

BY a settlement, made in *June*, 1829, certain lands were limited to *Thomas Blakemore* the elder, for life, with remainder to three trustees, for a term of 1,000 years, upon trust, after the decease of *Thomas Blakemore* the elder, and of his son *John Blakemore*, to raise 1,500*l.* as a portion or portions for, and for the sole benefit and advantage of, the child or children of the said *John Blakemore*, lawfully begotten, and surviving him and the said *Thomas Blakemore* the elder; such sum of 1,500*l.* to vest in and to be paid to, between and among such child or children in manner following; (that is to say) if there shall be but one such child, the whole of the said sum of 1,500*l.* to vest in and be paid and payable to such only child at his or her age of twenty-four years, if the same age or time shall be attained or happen after the decease of the survivor or longer liver of the said *Thomas Blakemore* the elder, and *John Blakemore*; but if the same shall be attained or happen in the lifetime of such survivor, then immediately upon or after his decease; and if there shall be two or more such children, then the said sum of 1,500*l.* to vest in, and be paid and payable to, between or among such two or more children in equal shares and proportions, the share or shares of such of them as shall be a son or sons to vest in, and to be paid and payable to him or them respectively, at his or their age or respective ages of twenty-four years; and the share or shares of such of them as shall be a daughter or daughters to vest in and be paid and payable to her or them respectively at her or their like age or respective ages

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ages of twenty-four years, if the same ages or times respectively shall be attained or happen after the decease of the survivor or longest liver of the said *Thomas Blakemore* the elder, and *John Blakemore*; but if the same shall be attained or happen in the lifetime of such survivor, then immediately upon or after his decease." It then provided, that if "any one or more of them (the children) shall die before he, she or they shall acquire a vested interest or interests" in the fund "under or by virtue of the trusts, powers and provisions thereinbefore contained," then the original share intended to be thereby provided, and the surviving or accruing share, "shall vest in, accrue and belong to the survivor or survivors, or other or others of such children," equally, in the same way as their original shares. The trustees were empowered, after the decease of *John Blakemore* and *Thomas Blakemore* the elder, to apply the interest "of the expectant or presumptive share of every such child," as aforesaid, of the said *John Blakemore*, who shall then be under the age of twenty-four years, "for or towards his or her maintenance," &c. "until they respectively attain twenty-four. If the 1,500*l.* should be raised, and all and every the children or child of the said *John Blakemore*, for whose benefit the same was provided, shall depart this life before his or her shares or share shall become vested, under the trusts and directions hereinbefore for that purpose contained," the trustees were to hold it in trust for *Thomas Blakemore* the younger. The estate was limited in remainder in fee to *John Blakemore* the younger.

*Thomas Blakemore* the elder died in 1833, *John Blakemore* died in 1844, leaving an infant daughter, and *Thomas Blakemore* the younger died in 1852, and his widow was his executrix.

A question

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Settlement.

A question being raised as to the validity of the trust in favour of the children of *John Blakemore*, on their attaining twenty-four, the 1,500*l.* was paid into Court; and Mrs. *Blakemore*, the executrix of *Thomas Blakemore* the younger, presented a petition for payment of the money to her.

Mr. *Follett*, for the Petitioner, contended that the limitation to a class which did not vest until they attained twenty-four, was void for remoteness.

Mr. *Greene*, for the infant child of *John Blakemore*. The first branch of the clause is clearly valid. The trustees are to raise the fund as a portion of the children of *John*, surviving him, and his father. What follows relates to the payment. The word vest is used, not in its ordinary sense, but in the sense of, "not subject to be divested or indefeasible," as in *Taylor v. Frobisher* (a). The vesting is made clear by the gift of the whole intermediate income for maintenance. *Davies v. Fisher* (b).

Mr. *Rudall*, for the purchaser of the estate.

Mr. *Horsey*, for the trustees. The following cases were also cited: *Fonereau v. Fonereau* (c); *Hoath v. Hoath* (d); *Marquis of Bute v. Harman* (e); *Bull v. Pritchard* (f); *Newman v. Newman* (g); *Bland v. Williams* (h).

The MASTER of the ROLLS reserved judgment.

*The*

(a) 5 *De Gex & Sm.* 191.

(b) 5 *Beav.* 201.

(c) 3 *Atk.* 645.

(d) 2 *Bro. C. C.* 4.

(e) 9 *Beav.* 320, corrected 16 *Beav.* 166.

(f) 1 *Russ.* 213; 5 *Hare*, 567.

(g) 10 *Sim.* 51.

(h) 3 *Myl. & K.* 411.

*The MASTER of the ROLLS.*

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*In re*  
**BLAKEMORE'S**  
**Settlement.****March 27.**

The question on this settlement is, whether a sum of 1,500*l.*, which is directed to be raised for portions, by the terms of the settlement, became vested in the children of *John Blakemore*, on the death of the tenant for life, or whether the vesting is postponed until they attain twenty-four. It is obvious, that if the gift did not vest on the death of the tenant for life, it is too remote, and that effect cannot, therefore, be given to it.

The Court, no doubt, strives to support the limitations contained in an instrument, and to make it effectual if it can, and it also leans to that construction by which the earliest period of vesting may be attained; but then, the Court must construe the words as it finds them, and cannot vary them, in order to do that which it considers more convenient. After some reluctance, I have come to the conclusion, that the portions did not vest in the children till they attained twenty-four, and that they are therefore too remote, and cannot take effect. The words are, "levy and raise the sum of 1,500*l.* of lawful British money as a portion or portions for, and for the sole benefit and advantage of the child or children of the said *John Blakemore*, lawfully begotten, and surviving him, and the said *Thomas Blakemore* the elder." Now I concur in the argument addressed to me by Mr. *Greene*, that if the clause in the settlement had stopped there, there would be no doubt that the portions were given to the children, as a class, who survived *Thomas* and *John Blakemore*.

The portions being thus far vested, I should require strong words to recall the vesting. But the instrument

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Settlement.

ment goes on to say, that the 1,500*l.* is to vest in, and to be paid to them, "at his or her age of twenty-four years," &c. Now the words "vest in" have a distinct and definite meaning, and this passage, therefore, clearly imports that the portions are not to vest earlier than at the age of twenty-four. I am far from saying that these words cannot be controlled; for no doubt they may be controlled by subsequent expressions, and I then have to look whether there are any such subsequent expressions.

- The gift over is, if all the children shall die before their shares shall become vested, under the trusts thereinbefore contained. It was stated before, when they were to become vested, and I therefore assume that the gift over is to take effect if they should all die before attaining twenty-four years. The provision for maintenance is to apply the income, not of the share of each child, but "of the expectant or presumptive share," and therefore treating the shares as not being then vested. It is also to be observed, that this is a case of a deed, and not of a will; and though I should not deal with this distinction very strictly, yet there is not so much latitude of construction in deeds as in wills; for although, in both cases, you must try to ascertain the meaning of the parties, yet you are more tied down to the actual words used in the case of a deed than of a will. The expressions throughout the deed do not in any respect tend to modify the effect of the previous words "vest in." I am unable to bring this case within the principle of the cases of *Bland v. Williams* and *Taylor v. Frobisher*, where the gift over was upon death under a certain age, without leaving issue; and I have come to the conclusion, that these portions were not to vest until the children attained twenty-four, and the necessary consequence is, that they are too remote.

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Dec. 13, 14,  
15, 21, 22.

1855.

Jan. 10, 15.

May 22.

GRAY v. HAIG (a).

HAIG v. GRAY.

THIS case occupied seven days in argument; many of the points were of interest to the parties alone, and not to the profession, these therefore are omitted.

Mr. Lee and Mr. J. V. Prior, appeared for Mr. Gray.

Mr. R. Palmer and Mr. Haig, for Messrs. Haig.

(a) S. C. 13 Beav. 65.

When an accounting party destroys the accounts before the matters have been finally adjusted, and still more pending a litigation, the Court will presume everything most unfavourable to

him, consistent with the established facts.

The Court will not act on the testimony of a single witness against the express denial on oath of the Defendant; but where the written evidence has been destroyed by the Defendant *pendente lite*, the Court will assume, that, if forthcoming, it would have proved the statement of the single witness.

If an agent, by his own conduct, makes it impossible to ascertain the amount of profit realized, he will be disallowed the commission, which, otherwise and according to the contract, he would be entitled to claim.

The Plaintiffs appointed the Defendant their agent for the sale of spirits at a commission. The Defendant had made profits by the sale of the Plaintiffs' goods, for which he had not given credit; he had also made profits by selling his own spirits mixed with those of his principals, and he had destroyed books of account pending the litigation. The Court disallowed him, in taking the accounts, 7,000*l.*, the amount of commission, which, by the contract, he would have been entitled to if his conduct had been proper.

A charge, made by an agent for the sale of goods against his principal, for an allowance in respect of warehousemen's salaries, disallowed, no such claim having been made in the accounts for fourteen years.

This Court will not send a question to be tried by a jury, unless it entertains serious doubt on the matter.

The Court will not send to be tried by a jury a question which is supported by competent evidence, and which, if untrue, could have been disproved by evidence in the possession of one party, who has taken means to prevent its being made available for the determination of the question by the Court.

The Court deals severely with any irregularities on the part of an agent, and requires him to act strictly, in all matters relating to such agency, for the benefit of his principal.

It is imperative upon an agent to preserve correct accounts of all his dealings and transactions; and the loss, and, still more, the destruction of such evidence by the agent, falls most heavily upon himself.

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The following authorities were cited: *Shaw v. Picton* (a); *White v. Lady Lincoln* (b); *Lupton v. White* (c); *Clarke v. Tipping* (d); *Ex parte Laey* (e); *Ex parte Bennett* (f); *Benson v. Heathorn* (g); *Lees v. Laforest* (h); *Beaumont v. Boulbee* (i).

As to making a decree upon the evidence of a single witness against the answer, *The East India Company v. Donald* (k) was cited.

As to the right to try the question at law, *Elderton v. Lack* (l) was referred to.

*The MASTER of the ROLLS* reserved judgment.

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May 22.

*The MASTER of the ROLLS.*

The questions on which I reserved my judgment arise on exceptions to the report of the Master. They are very numerous, and depend principally upon documentary and oral testimony of great bulk and complexity, and I have found it necessary to read through a great mass of papers, for the purpose of testing the accuracy of the impressions I received, and the conclusions I was disposed to arrive at from the comments and arguments of Counsel.

The matters contested, which are numerous, arise on taking the accounts between both parties, during a long course of dealing, which arose thus:—

Messrs.

- (a) 4 *Barn. & Cr.* 715.
- (b) 8 *Ves.* 363.
- (c) 15 *Ves.* 432.
- (d) 9 *Beav.* 284.
- (e) 6 *Ves.* 625.
- (f) 10 *Ves.* 381.

- (g) 1 *Y. & C. (C. C.)* 326.
- (h) 14 *Beav.* 250.
- (i) 11 *Ves.* 358.
- (k) 9 *Ves.* 275.
- (l) 2 *Phill.* 680.

**Messrs. Haig** and Son are distillers, carrying on business at *Lochrin*, in the neighbourhood of *Edinburgh*. **Mr. Gray** carries on business at *Newcastle-upon-Tyne*, as a commission and general merchant. In the early part of 1834, an arrangement was entered into between them, by which **Mr. Gray** was intrusted and undertook to sell spirits on behalf of Messrs. *Haig & Son*, receiving a commission for so doing of 2d. per gallon. This continued till *July*, 1842, when *James Haig & Son*, finding the amount of bad debts larger than they had anticipated, made a fresh arrangement, by which the commission was converted into a *del credere* commission, and **Mr. Gray** was, in consideration of this circumstance, which would throw the loss arising from the bad debts on him, to receive an increased commission of 3d. per gallon. In *October*, 1847, according to an account taken between a person of the name of *Fell*, who was sent for that purpose from *Scotland* by *James Haig & Son*, **Mr. Gray** admitted a balance of 5,737*l.* 13*s.* 2*d.* to be due from him to *Haig & Son*, and deposited certain deeds relating to real estate, as a security for that amount. In the early part of 1848, the agency ceased, and all business transactions were put an end to between them. In the course of that year, and the beginning of 1849, 1,300*l.* was paid by *Gray* on behalf of the balance of 5,737*l.* 13*s.* 2*d.* In *March*, 1849, *Gray* disputed the accuracy of that balance, and alleged that there was a balance due to him from *Haig & Son*. In *June*, 1849, *Gray* filed his bill in this Court against *Haig & Son*, praying that an account might be taken of all the transactions in which he had acted as agent for them, and asking for an injunction to restrain *Haig & Son* from suing him at law, on the security given for payment of the balance before mentioned. In *March*, 1850, *Haig & Son* filed a cross-bill against *Gray*, Praying for an account of the transactions between them

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1855. them from 1836, and for special directions in taking these accounts.

GRAY

v.

HAIG.

HAIG

v.

GRAY.

Both causes came on to be heard before me in *June*, 1852, when I referred it to the Master to take these accounts, and gave some special directions as to the manner in which the Master was to act in certain particular cases, and I also gave the Master a special direction to look into certain books of Mr. *Gray*, and if he thought it proper, to allow an inspection of them to *Haig & Son*.

Sir *George Rose*, the Master to whom this cause was referred, was actively engaged for a long period of time in prosecuting this inquiry. He examined the books produced and heard evidence *viva voce* on both sides, and made his report on the 26th of *May*, 1854. He took the accounts from the commencement of the agency, dealing with the various questions which arose in the course of the fourteen years that this agency lasted; and in conclusion, he found, on the balance of these accounts, that a sum of 11,666*l.* 12*s.* 11*d.* was due from Mr. *Gray* to *James Haig & Son*, subject, however, to reduction, if the Court should be of opinion that Mr. *Gray* is entitled to commission on certain sales, which the Master has not allowed to him, but which question he submits to the judgment of the Court.

To this report Mr. *Gray* has taken sixty-five exceptions, and *James Haig & Son* have also, on their side, taken four exceptions to this report. The argument on these exceptions occupied necessarily a very considerable time, and I have also been compelled to devote considerable additional time to the consideration and investigation of the matters involved in them. In fact, there arise a series of questions quite distinct from each

each other, during the whole course of this agency, involving points of law, and depending upon evidence of disputed facts. I shall state the principles on which I have proceeded, and the results at which I have arrived on these questions, as concisely as I am able.

The first matter I think proper to mention is, the fact that the Court has not now before it all the evidence which was once in existence, to assist it in the solution of these questions, and that this defect of evidence, and the obscurity arising from it, springs from the act of Mr. *Gray*, who has parted with or destroyed many of the books relating to these transactions. Two sets of books were, it appears, kept by Mr. *Gray*, one a set kept by his clerks, and which contained accounts of the actual dealings with the goods of *Haig & Son*, and with his own goods, and of the money and bills actually received by him; and also a second set of books which contain the accounts from which the account sales and accounts current, and other accounts furnished to *James Haig & Son*, were prepared. This first set of books is not forthcoming. The account he gives of their destruction is in folio 12 and 13 of his further answer to the original bill, in folio 66 of his answer to amended bill, and in his cross-examination before the Master. In his answer he states, generally, that this destruction took place when he left *Pilgrim Street*, and that it was in or about the year 1847, that the books were sold for waste paper to Mr. *Robinson*, in *Newcastle*, who informs him that they have all been destroyed. In his cross-examination he states, that he left *Pilgrim Street* in 1848, the destruction by sale must therefore have taken place in that year; and in his cross-examination he also admits, that one of the books, which is not now forthcoming, and which is very material for several of the questions in the cause, viz.

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“The Spirit Customers’ Ledger,” marked B, was in his possession in the latter end of 1848 or in 1849, he forgets which, he thinks it was in 1848. In the books which are produced, there are references of posting to this ledger, made under dates of *July* and *November*, 1849. Ultimately he states, that at the end of 1849, he had not a single book in his possession, except books relating to his private business, and in answer to a question from the Master he states, that the books were destroyed at the latter end of 1849, but before any bill had been filed against him. The contest now to be decided between these parties arose in *March*, 1849, when Mr. *Gray* receded from the admission, made by him in *October*, 1847, of a balance of 5,737*l.* being due from him, and claimed, in *March*, 1849, a balance to be due to him. But for that claim and his resisting payment of the balance previously admitted, these suits would not have existed. His original bill was filed on the 14th of *June*, 1849, and it appears to me to be an irresistible inference, from the evidence I have referred to and the dates I have stated, that these books, or the most material ones, were disposed of *post litem motam*. In addition to this, one book is now produced in a mutilated form, the book having been divided through the middle transversely, so as to remove from examination all the entries contained in the lower half of each page,—this is the “Cask Ledger Book.” “The Cellar Book,” “The Day Book,” “The Bills Receivable Book” and “The Order Book” were all disposed of and destroyed, and none of them are now forthcoming.

This is thus stated by the Master in his report:—“And I find, that *Gray*, since this litigation commenced, destroyed all or most of the books necessary for or requisite in a due investigation of the matters to be enquired into under the decree, and particularly his  
‘receipt

'receipt and delivery cellar books,' which, as it is alleged, contains the records of the mixing of the said spirits and disposal thereof, his 'spirit order books,' his 'spirit day books,' and his 'spirit customers ledger B,' and in fact all, or most, or many of the records of his real transactions in whiskey; and it appears by the answer of *Gray*, that his own private dealings with the customers of the said firm fully appeared by the entries, made by his clerks in the various books, distinguished by the name and other words and dates in the second part of the second schedule to his answer; and in the second part of the second schedule, he inserted three ledgers for consecutive years from 1841 to 1848, five books called 'day books' or 'journals' for the same years, three 'bill books' for consecutive years, from 1838 to 1848, all which books he, by his answer, objected to produce, and afterwards closely sealed up on oath, as not relating to the matters in question in this cause, but the same having been opened by my order, were found not to be the 'ledgers' containing his customers accounts at all, such pretended 'day books' or 'journals' were found not to be the day books or journals at all, but 'fruit stock books' and 'carriers receipt books,' untruly labelled and described, and such bill books were found to be only parts of bill books, containing bills payable by *Gray*, the other and larger parts containing the bills receivable by him having been cut out, severed and destroyed, and the remainder of the said bills and books re-bound.

" And I find, that by reason of the destruction of his said genuine books as aforesaid, the prices obtained by *Gray* for the goods of his said principals, and the profits he made by such mixings as aforesaid, cannot now be ascertained."

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In a case before me this year, one partner, several years before the institution of the suit, and upwards of twenty years after the closing of the partnership business, and when the accounts had been settled between him and his partners by arbitration, and never afterwards opened or disputed, had destroyed the books which contained the accounts of that partnership, I treated lightly the circumstance of that destruction, and did not suffer it to prejudice his case. But the case is very different when the transactions to which they relate are recent, where the accounts arising from them have not been finally adjusted, or the balance ascertained or paid, and still more when that destruction takes place by the person who has actually filed a bill to have the accounts taken of those very transactions to which these books relate. In such a case some very cogent reason must be given to satisfy the Court that the destruction was proper or justifiable, and, in the absence of any such satisfactory reason, which is the fact here, I am compelled to act on the principle laid down in the well-known case of *Armory v. Delamirie (a)*, and presume, as against the person who destroyed the evidence, every thing most unfavorable to him, which is consistent with the rest of the facts, which are either admitted or proved.

I shall hereafter state my decision on each particular exception, but I have thought it proper to make these preliminary observations, and I shall now proceed to state the opinion I have formed on some general points, each of which covers several exceptions.

The exceptions, generally, may be divided into two classes, which are subject to subdivision afterwards. One of the classes relates to the employment and general conduct

(a) 1 *Strange*, 505.

conduct of the agency business, and the other relates to individual particular transactions.

In the former class, the first question is, on what terms was the agency given to and accepted by Mr. *Gray*. It was agreed between them that Mr. *Gray* should be the sole agent for *Haig & Son*, and that he should act for no other firm. So far there is no contest. *Haig & Son* also allege, that it was agreed between them that he should not sell spirits on his own account. This is contested by Mr. *Gray*. The Master finds that there was an understanding between them to this effect, not amounting to an agreement, and it was justly argued before me, that an understanding not amounting to an agreement is merely nothing. An understanding may exist on one side only, or on both sides. If it exists on one side only, it obviously amounts to nothing, if it be a mutual understanding, then it amounts as clearly to an agreement, subject to any question relative to the Statute of Frauds, which does not arise here. If there was a mutual understanding on both sides that Mr. *Gray* was not to sell spirits on his own account, that, in my opinion, amounts to an agreement between them, that this condition was to form one of the terms of which the agency was to be conducted. It is, I think, clearly established that Messrs. *Haig & Son* considered and believed that this was one of the terms of the agency of Mr. *Gray*. The evidence of *Fell* and *White* is distinct on this point, and that *James Haig & Son* would not have employed Mr. *Gray* as agent on the terms of his being at liberty to sell spirits on his own account. I am also of opinion that Mr. *Gray*, when he accepted and carried on this agency, was aware of such belief and understanding on the part of Messrs. *Haig & Son*, and that he assented to take the agency on such terms. I formed my opinion from these

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these circumstances, first, that Mr. *Gray* was not to act for any other principal in the sale of spirits. Now, as he was not himself a distiller, if he might sell spirits on his own account, the prohibition to act as an agent for others would be merely nominal, and incapable of being enforced. And this is shown by the manner in which Mr. *Gray* alleges that he carried on business for *Haig & Son*. In the next place, I am unable, on any principle, to explain why Messrs. *Haig & Son* should pay to Mr. *Gray*, or allow to him in his accounts with them, the expenses of taking out the licence to sell spirits, if he were at liberty to buy spirits from other houses and sell them as his own. In the third place, I find that Mr. *Gray* did not communicate to Messrs. *Haig & Son* the fact that he sold spirits in his own name, but that in his accounts it appeared as if he sold the spirits therein mentioned on their account, and as their agent. And in the fourth place, *White* distinctly swears that this was a part of the agreement on which the agency was founded. I am of opinion, therefore, that one of the terms on which the agency was to be conducted, although not expressed in writing, was, that Mr. *Gray's* sale of whiskey should be confined to the sale of the whiskey of Messrs. *Haig & Son*, as long as that agency lasted.

The next matter relating to the general conduct of the agency has reference to the following subject. The Master has found, that no fictitious sales were proved before him, but that sales appeared to him to have been made, in all or most instances, in a manner inconsistent with the duty of *Alexander Gray* as agent. The Master has stated, specially, some of these transactions to the Court. I concur with the Master in his view of the subject, and in the particular cases he mentions in his report, which form the subject of subsequent exceptions,

ceptions, and which I shall have to observe upon. I am of opinion that the sales were conducted in a manner irregular and inconsistent with the duty of Mr. Gray as the agent of Haig & Son.

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The most material matter with reference to this subject is, the question which is raised by the passage in the 10th page of the Master's reports, and forms the subject of several exceptions. [*His Honor here referred to a charge made against Gray, and found by the Master, of having mixed Messrs. Haig's whiskey with inferior whiskey of his own, and selling them together. He however was unable to ascertain the profits made, in consequence of the destruction and non-production of Gray's books.*] The evidence brought to establish this charge is principally that of John Rikey, who was a clerk in the service of Mr. Gray, from 1829 till 1836, and consequently during two years of the agency. He swears expressly to the fact of the mixing of the different qualities of whiskey, and to the mode in which they were sold. If his evidence is to be believed, a more irregular practice, or one more likely to injure his principals cannot well be conceived, a practice wholly inconsistent with the duty of an agent. This is expressly and emphatically denied by Mr. Gray in his *vis à voce* testimony before the Master. If the matter rested here, I should not act upon the testimony of one witness against a party as to a fact expressly denied by him on his oath. But in all cases of contradictory evidence, whether between a witness and a Defendant, or between two witnesses who give evidence in direct contradiction to each other, with regard to a matter equally within the knowledge and cognizance of both, it is the duty of a judicial tribunal to search for facts which may corroborate or invalidate the testimony of either witness. In this case there were books containing the account



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account of the transactions, which would have afforded clear and distinct evidence to enable the Court to judge which of the two was to be believed. This evidence Mr. *Gray* has himself removed, and removed, as I consider proved by his own evidence, after the contest relating to these accounts had arisen between himself and *Haig & Son*. He must suffer the necessary consequence of the absence of that evidence so occasioned; and I consider myself bound to believe that these books, if now forthcoming, would prove the truth of the statements contained in *Rikey's* evidence. It does not, however, rest here. *Kelly* was a clerk in Mr. *Gray's* office, from *November, 1842*, till *September, 1846*, during the time when this agency lasted. He speaks distinctly to the mixing of whiskey. [*His Honor here read parts of the evidence.*] Several other instances are established by his evidence as to the character of the books, and the following passages in his evidence are material. He gives further evidence to shew the alteration and change which has taken place in the produced books by the abstraction of part and the mutilation of others. [*His Honor here read Kelly's evidence.*] The evidence of this witness is not touched on cross-examination beyond this:—that it shews that he entertains a very hostile disposition towards Mr. *Gray*. I have, therefore, two witnesses deposing positively to the fact of this practice of mixing the spirits, to the injurious consequences of it, and to the alteration made between the price invoiced to the purchaser and that entered in the books containing the accounts to be sent to *Haig & Son*, and deposing positively to the fact, that the books which contained the account of the real transactions, if produced, would prove the truth of their assertions. I have then the most material books suppressed — by Mr. *Gray*, and some of those which are produced mutilated by the abstraction of pages, and re-bound in an altered

altered form, and one by being divided into two parts, crosswise; and I am asked to discredit this testimony on the sole positive denial of Mr. Gray.

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Mr. Lee indeed urged strongly, that if I was not disposed to discredit the testimony of the witnesses, I should at least send the question to be tried before a jury on the issue of fact; but this suggestion I decline to adopt. I fully admit the value of and the advantages derived from sifting a question by *vivá voce* testimony before a jury, but it is the duty of the Court not to put parties to the expense and delay of such an additional mode of investigation, unless it entertains a serious doubt on the question. The Master heard *vivá voce* evidence before him on this subject, he entertained no doubt on the question, and I entertain none; and if I did, I should consider that the doubt had been occasioned by the loss of that very evidence that would have cleared up the whole matter, and which loss had been intentionally occasioned by the party who now asks for the issue.

The same evidence satisfies me that fictitious sales were made by Mr. Gray. I have read various passages from the evidence of Kelly; Rikey swears to the same effect; Loader, a clerk of Mr. Gray's, examined as a witness on his behalf, in his cross-examination says— [His Honor read his evidence]. Here, again, the absence of the books containing the correct account of these transactions tells most prejudicially against Mr. Gray, and the observations I have already made I refer to as applicable to these cases. The correct account of these transactions, so far as Loader himself conducted them, was entered in the books which are not forthcoming.

The evidence also establishes conclusively, in my opinion, that Mr. Gray procured bills of exchange from many

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many of the purchasers of the goods of *Haig & Son* sold by him, and that he negotiated those bills, without their knowledge and in opposition to express general directions from them to the contrary, all which is distinctly shewn in several of the particular cases to which I am shortly about to refer. It is also established by the evidence, in the like conclusive manner, that Mr. *Gray*, on various occasions and so frequently that it may almost be said that he was in the habit of doing it, conducted the correspondence with Messrs. *Haig & Son* in such a way, as to induce them to believe that he had gone to *Liverpool* or *Manchester*, whenever he thought that it would appear desirable for the good management of their business that he should have so done, although in fact he had not left *Newcastle*. This he accomplished in the following manner:—When goods of *Haig & Son* had been sold or consigned by his direction to *Liverpool* or *Manchester*, and some steps were necessary or proper to be taken with reference thereto, he, remaining at *Newcastle*, wrote a letter to Messrs. *Haig & Son*, dated the following day, at *Manchester* or *Liverpool*, which letter he sent under cover to his correspondent or agent at *Manchester* or *Liverpool*, with directions that the letter might be posted at that place, and thus giving *Haig & Son* the false impression that he had taken a journey to that place, for the purpose of doing what might be needful in reference to the matters contained in that letter. These are the observations I think it necessary to make with reference to the general manner in which the business of the agency was conducted, subject, however, to such further references to the same subject, as will necessarily be derived from the consideration of various individual instances mentioned in the Master's report, and to which I shall presently refer. I reserve, till after I have noticed these instances, all observations on the question of the commission claimed by

by *Mr. Gray*, and which the Master specially submits to the consideration of the Court.

Before, however, noticing these individual cases, it is proper to point out the course which the Master adopted in pursuing the reference and taking the accounts directed by the decree. The accounts were, in the first place, referred to *Mr. Duncan*, a professional accountant, who took the account, so far as it depended upon items not disputed on either side, but all matters and items in dispute he was directed to reserve for the Master's decision. This was accordingly done, and *Mr. Duncan* certified, that the sum of 339,957*l.* 16*s.* 6*d.* had been received by *Gray*, the particulars of which were not disputed, and were set forth in Schedule (A); that the sum of 328,351*l.* 3*s.* 7*d.* had been paid or accounted for by *Gray*, the particulars of which were not disputed, and were set forth in Schedule (B), leaving a balance of 11,606*l.* 12*s.* 11*d.* due from *Gray* to *Haig & Son*; that *Gray* had sought to charge *Haig & Son* with the sum of 17,797*l.* 6*s.* 1*d.*, the particulars of which were set forth in Schedule (C); that *Haig & Son* had sought to charge *Gray* with the sum of 3,159*l.* 4*s.* 2*d.*, the particulars of which were set forth in Schedule (D); and the items in these two schedules being disputed, were reserved for the decision of the Master.

The Master then set out, in the first part of the schedule to his report, the items claimed by *Gray* which he has disallowed, with the reason against each item for such disallowance, and in the second part of that schedule he has set forth the items claimed by *Haig & Son* which he has allowed. To many of these items, in both parts of the schedule, exceptions are taken by *Mr. Gray*, three of these exceptions are of a general nature; they relate, first, to the disallowance of a sum claimed for warehouseman's

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warehouseman's salary, and, secondly, to the disallowance of travelling expenses, and thirdly, the disallowance by law expenses. The remainder relate to allowances in respect of particular individual cases. [*His Honor here proceeded to consider them seriatim in the order mentioned in the Master's report.*]

With respect to the three general questions, which I reserved till I had gone through the particular cases, they may be shortly disposed of. I am of opinion, that Mr. *Gray* is not entitled to an allowance in respect of warehouseman's salary. This is disposed of by the fact that no entry or claim to this effect appears in any of the accounts rendered by him for fourteen years to *Haig & Son*. It shows, therefore, that the footing on which the agency was conducted did not admit of this charge, or some trace of it would have appeared in the accounts or in the correspondence.

[*The MASTER of the ROLLS* then proceeded to dispose of the charge for law expenses and for travelling expenses. The first he disallowed, because Mr. *Gray* failed in proving that any law expenses had been incurred by him in matters relating to the agency, except in cases where his Honor had determined he was bound to bear the loss on the transaction; and the second, on the ground that the accounts between the parties wholly omitted any such item, and that on one occasion only, in the correspondence, *Gray* asked to be allowed the expenses of one particular journey on special grounds, thereby negating the general right to make such a charge.]

Beyond these, the only other matter I have to dispose of, is the question of commission, the amount of this is admitted to be 7,102*l.* 12*s.* 5*d.* *Primâ facie* Mr. *Gray* is

is entitled to this commission, and the burden of proof lies on *James Haig & Son* to shew, that he is not so entitled by reason of his conduct in the matter of this agency.

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Upon the best consideration that I have been able to give to this item, which, in taking these accounts, is the most important of all to the parties concerned, I am of opinion, that Mr. *Gray* is not entitled to the commission agreed between *Haig & Son* and himself to be paid to him on taking this agency; and that although the burden of proof lies on *Haig & Son* to prove this, they have succeeded in doing so. The principle on which I proceed is that to be found in *White v. Lady Lincoln* (a), and in *Lupton v. White* (b), which principle is undoubted, and the only question is, whether the facts of this particular case bring the matter within that principle. The principle may, for the present purpose, be thus expressed:—if an agent deal with the goods of his principal as his own, making a profit out of them not accounted for to the principal, and if the agent, by his own conduct, has made it impossible to ascertain what the amount of profit is which he realized, he shall not be allowed the commission, which otherwise and according to the contract he would be entitled to claim. In the case of *White v. Lady Lincoln* the agent and manager of the property, who was also the solicitor, kept no regular accounts, or any papers from which such accounts could be made out; he kept all the vouchers which told in his own favour, but no evidence of the receipts in respect of which he was to be charged. His executors were held not to be entitled, on his behalf, to claim against the principal the charges, which, in other circumstances, he would have been entitled to make.

Lord

(a) 8 Ves. 363.

(b) 15 Ves. 432.

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Lord *Eldon* there says (a):—"With respect to *Jackson's* demand as auditor, steward, agent, and all except his bills as attorney, as to all which he was bound to keep accounts of those transactions, I must lay down the rule, that a man, standing in a relation imposing a duty to keep regular accounts, cannot be permitted to make a demand for work and labour in that character, with reference to which he has kept no account; which is justified by principle, that ought to be loudly published,—that a receiver who does not pass his accounts regularly, ought not to be allowed any poundage. That principle applies to all these demands except the bills of costs."

In *Lupton v. White*(b), Lord *Eldon* laid down that where an agent or bailiff confounds the property of his principal with his own, he will be charged with the whole, except what he could prove to belong to himself. Lord *Eldon* says:—"If a man by his own tortious act makes it impossible for another to ascertain the value of his property, and that in a transaction, in which the former was not merely under an implied moral obligation, but pledged by a solemn undertaking in a court of justice that such should not be the state of things between them, by these means preventing the guard which the Court would have effectually interposed, is the argument to be endured, that, as the party so injured cannot distinguish his property, therefore he shall have nothing? That is not the law of this country as administered in Courts, either of law or equity."

And after referring to the case of the chimney-sweeper's boy, who found a jewel (c), and other cases, he says:—"What are the cases in the old law of a mixture

(a) 8 Ves. 371.

(b) 15 Ves. 432, 439.

(c) *Armory v. Delamirie*, 1 Strange, 505.

ture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity; but, if articles of different value are mixed producing a third value, the aggregate of both, and through the fault of the person mixing them the other party cannot tell what was the original value of his property, he must have the whole, and the principle goes to the full extent of what is now contended." By the decree in that case, the Defendants, who had wrongfully worked an adjoining mine and had kept no accounts, though they had entered into an undertaking so to do, were charged with the whole net produce of both mines, except what they should prove to have been taken from their own.

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In this case, the books, which would have proved the clear state of the accounts between the parties, have been destroyed by Mr. Gray after the litigation had begun. Upon the evidence before me, I see proof that, in several cases, Mr. Gray made, on the sale of the goods of his principals, a profit which he did not give credit for to them.

The evidence of *Rikey* and *Kelly* are distinct on this point, and this is confirmed by the evidence of *Matthewson* and of *Anthony Dunn*.

That profits were made by the mixing of the spirits, which, as I have already stated, I consider to be proved, is also, in my opinion, established by the evidence I have referred to. The amount of those profits nowhere appears in the accounts before me, but would have appeared in the accounts destroyed. The means, therefore, of ascertaining the amount of them are removed by Mr. Gray. The observation I have already made, and which I have so often referred to

on

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on this subject, I refer to again; it is most material in this part of the case, it is that which, in fact, has governed and occasioned my decision throughout the greater part of it, and I repeat again, that I will not send to be tried by a jury a question which is supported by competent evidence, and which, if untrue, could have been disposed by evidence in the possession of one party, which he has taken means to prevent from being made available for the determination of the question by the Court.

The result is, that in my opinion, Mr. *Gray* is not entitled to be allowed the commission which otherwise would have been his as of right. I believe, in this case, as in most cases of this description, the want of evidence operates much more prejudicially to the person who causes its removal than if the evidence had been before the Court, but the rule of law and of equity, and of morality and of common sense, in all such cases, is one and the same, and it is, in my opinion, inviolable. It is of the greatest importance for the conduct of all business transactions in this country, whether commercial or otherwise, that the parties who deal together should understand, that perfect fairness and openness is that system which alone it is their interest to adopt.

[After going seriatim through the exceptions and specifying the order to be made on each, the Master of the Rolls proceeded as follows:]—

I cannot conclude this case without expressing my regret, that I have felt it my duty to make a decision on these points which will lead to so stringent a decree against Mr. *Gray*. It cannot, however, be too generally known or understood, amongst all persons dealing with
each

each other, in the character of principal and agent, how severely this Court deals with any irregularities on the part of the agent, how strictly it requires that he who is the person trusted shall act, in all matters relating to such agency, for the benefit of his principal, and how imperative it is upon him to preserve correct accounts of all his dealings and transactions in that respect, and that the loss, and still more the destruction of such evidence, by the agent, falls most heavily on himself.

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NOTE.—See *Walmsley v. Walmsley*, 3 Jones & Lat. 556; *Popham*, 38; *The Duke of Leeds v. Lord Amherst* (before the Vice-Chancellor of England, see the next case); *Mawman v. Tegg*, 2 Russell, p. 390; *Lewis v. Fullarton*, 2 Beav., p. 11 *et seq.*; and the cases of spoliation of wills, *Saltern v. Melhuish*, *Ambler*, 247; *Barker v. Ray*, 2 Russell, p. 71; *Sugden's Law of Property*, 189; *Smith v. Spencer*, 1 *Younge & C. (C. C.)*, 75.

THE DUKE OF LEEDS v. The EARL OF AMHERST (a).

V. C. of
England.
1850.

April 16.

THE late Duke of *Leeds* was tenant for life, without impeachment of waste, of the *Keeton* Estate, with remainder to the Plaintiff. The late Duke, in 1808, caused the mansion-house to be pulled down and sold, and the ornamental timber to be cut, and he converted the park into a farm.

Where a wrong has been committed, the wrong doer must suffer from the impossibility of accurately ascertaining the amount of damage.

The late Duke died in 1838, and in 1840 the present Duke instituted this suit against the executors of the late Duke, for an account of the equitable waste.

Therefore where an account of the equitable waste committed by a tenant for life

At

(a) This characteristic judgment of Sir *Lancelot Shadwell*, which has never been reported,

is inserted as relating to the principles laid down in the preceding case.

was directed to be taken against his executors, which it was found the executors,

impossible to take accurately, and the Master had arbitrarily charged his report was supported.

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At the hearing in 1846, the Vice-Chancellor of England declared (a) that the personal estate of the late Duke was liable to account to the Plaintiff for all benefit and profit received by him for the equitable waste complained of, with interest from his death. And he referred it to the Master, *to take an account* of all sums received by the late Duke from the sale of the materials of the house, &c., and to inquire what ornamental trees had been felled, and *to take an account* of the monies received by the late Duke for the sale thereof, and to compute interest.

This decree was afterwards affirmed by Lord *Cottenham* (b).

The Master proceeded in the reference, but from the great lapse of time, the inquiry was one of great difficulty. It was impossible to ascertain, with any degree of accuracy, the receipts of the late Duke, or the precise amount of ornamental trees felled. Ultimately, however, the Master reported that 42,000*l.* was payable in respect of the receipts of the late Duke, arising from equitable waste and for interest on the amount received. This result did not appear to be supported by precise evidence of the amounts to the above extent actually received from the waste by the late Duke; it seemed rather to be an arbitrary charging of the late Duke's estate, allowing certain deductions therefrom under the head of "just allowances." The Defendants had not carried in any discharge claiming specific allowances.

The Defendants contended, that the amount actually received in respect of the waste did not exceed 11,000*l.*

They

(a) 14 *Simons*, 367.

(b) 2 *Phillips*, 117.

They took several exceptions to the report, and insisted that **the** evidence did not warrant the conclusion as to amount at which the Master had arrived. The exceptions were argued at great length by

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Mr. Stuart and Mr. G. L. Russell, in support of the exceptions.

Mr. Bethell and Mr. Renshaw, *contra*, for the Plaintiff.

The VICE-CHANCELLOR.

There is no question, as a matter of fact, that at an early period, about the year 1800, there was, to a certain extent, a dismantling of Keeton Hall, because, independent of the parol evidence which has been given upon the subject, no one can look at the map without seeing that there is no vestige in it of the south wing, which certainly did formerly exist; and it seems to me, from what was determined upon the exceptions, which were brought before me in 1848, that I did determine that it was quite competent to the Master, in making the inquiry, to have regard not merely to what took place in the year 1809, but to that anterior period which followed soon after the late Duke became possessed of Keeton. Whatever was done in or about the year 1800, it appears that a great deal was unquestionably done in the year 1809, and at some subsequent time.

The exceptions (except the first, which is rather formal than substantial,) proceed mainly upon this:—that the Master was directed to take an account, and it is said, that he has not taken an account; it is further said, that at any rate he ought not to have found due from the estate of the late Duke those sums which he

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has found to be due in respect of the different matters upon which he has made his report.

Now I must say, that, in my opinion, this case is to be judged, not merely by the simple circumstances of evidence which are found in it, but with reference to those great principles of justice, which, as I apprehend, have always governed mankind, and have been acknowledged from the earliest times. It appears to me that it is a very right thing to hold in one's contemplation, on deciding such a case as this, what has been the uniform opinion of mankind upon such a general case as the one now presented in this cause. I take it, that the general wisdom of mankind has acquiesced in this:—that the author of a mischief is not the party who is to complain of the result of it, but that he who has done it must submit to have the effects of it recoil upon himself. This, I say, is a proposition which is supported by the holy Scriptures, by the authority of profane writers, by the Roman Civil Law, by subsequent writers upon Civil Law, by the Common Law of this country, and by the decisions in our own Courts of Equity.

I begin with the greatest authority, and I will take a very few words of the original (a),—*Πάντες οἱ λαβόντες μάχαιραν, ἐν μάχαρᾳ ἀπολοῦνται*—“All those who take the sword, shall perish by the sword.” “The mischief-maker shall suffer for the mischief which he hath created.”

Then you have as an example, which is almost daily in the mouths of men—

“*Neque enim lex æquior ulla,
 Quam necis artifices arte perire sua*” (b).”

Next

(a) *St. Matt.* c. 26, v. 52. (b) *Ovid.* *Art. Aman.* lib. i. lin. 655.

Next you have the authority of the Civil Law, and you will find in the second Book of the Institutes, under tit. i. and section 28, this statement :—" Quod si frumentum Titii frumento tuo mistum fuerit : si quidem ex voluntate vestra, commune est : quia singula corpora, id est, singula grana, quæ cujusque propria fuerunt, ex consensu vestro communicata sunt. quod si casu id mistum fuerit, vel Titius id miscuerit sine tua voluntate : non videtur commune esse : quia singula corpora in sua substantia durant. Sed nec magis istis casibus commune sit frumentum, quam grex intelligitur esse communis, si pecora Titii tuis pecoribus mista fuerint. Sed si ab alterutro vestrum totum id frumentum retineatur : in rem quidem actio pro modo frumenti cujusque competit : arbitrio autem judicis continetur, ut ipse æstimet, quale cujusque frumentum fuerit."

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Then there is a position in *Coke* which always struck me as very forcible. He is speaking of the case where a contract has been drawn up by one of the parties to it, and he says that the rule is this :—" *Pactionem obscurum iis oportet noscere in quorum potestate fuit, legem apertius scribere.*"

We have next a case in *Popham (a)*. He says :—" In trespassse for carrying away certain loads of hay, the case happened to be this : the Plaintiff, pretending title to certain hay which the Defendant had standing in certain lands, to be more sure to have the action passe for him, took other hay of his own (to wit, the Plaintiff's), and mixed it with the Defendant's hay ; after which, the Defendant took and carried away both the one and the other that was intermixed, upon which

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(a) Page 38, pl. 2.

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the action was brought. And, by all the Court, clearly the Defendant shall not be guilty for any part of the hay, for by the intermixture (which was his own act), the Defendant shall not be prejudiced, as the case is, in taking the hay. And now the Plaintiff cannot say which part of the hay is his, because the one cannot be known from the other, and therefore the whole shall go to him who hath the property in it, with which it is intermixed. As if a man take my garment and embroider it with silk or gold, or the like, I may take back my garment. But if I take the silk from you, and with this face or embroider my garment, you shall not take my garment for your silk which is in it, but are put to the action for taking of the silk from you. So here, if the Plaintiff had taken the Defendant's hay, and carried it in his house, or otherwise, and there intermixed it with the Plaintiff's hay, there the Defendant cannot take back his hay, but is put to his action against the Plaintiff for taking his hay. The difference appeareth. And at the same day at *Serjeants' Inn*, in *Fleet Street*, the difference was agreed by *Anderson*, *Periam*, and other Justices there. And this case was put by *Anderson*:—"If a goldsmith be melting of gold in a pot, and as he is melting it, I will cast gold of mine into the pot, which is melted together with the other gold, I have no remedy for my gold, but have lost it."

The same proposition is also to be found in *Warde v. Æyre* (a), where Lord *Coke* stated the law to be precisely in accordance with what was laid down in *Popkum*. The case was this:—"In an action for trespass for an assault

(a) 2 *Bulstrode*, 323.

assault and battery, and *quod cumulum pecuniæ, containing* five markes, *cepit*. The case appeared to be this : the Plaintiffe and the Defendant, being at play, the Plaintiffe thrust his money into the Defendant's heape, and so intermingled them together : the Defendant kept all, and upon this, being striving together for the money, for this the Plaintiffe brings his action." *Coke*, Chief Justice. In this case the law is, that if *J. S.* have a heape of corne, and *J. D.* will intermingle his corne with the corne of *J. S.*, he shall here have all the corne, because this was so done by *J. D.* of his own wrong, and so it was adjudged in a case between *Shordish* and *Moore*. And so it is in case of money ; if two being at play, and the one of them will intermingle his money in the other's heape of money, he shall now have all, for this is so done by him of his own wrong, and this we have so adjudged in Sir *Richard Martin's* case, for that his own proper money or corne cannot now be known, and therefore by this his intermingling being his own act, and of his own wrong, by the law he shall lose all ; for this is so used and done by him only as a trick, thinking thereby to deceive the other, and so to gain something by this to himself ; but by this his so doing he hath deceived himself, and shall now by this his tortious act lose all ; and if this should be otherwise, a man should be made to be a trespasser, *volens nolens*, by the taking of his goods again, and for the avoiding of this inconvenience, the law in such a case is, that he shall now retain all. The whole Court agreed with him herein against the Plaintiff, and for the reason aforesaid, and so the rule of the Court was, "*Quod querens nil capiat per billam.*"

In the second *Vernon*, at page 516 (*a*), you find this (it

(*a*) *Fellows v. Mitchell.*

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(it is given in the loose way in which *Vernon* states many things, especially in the second Volume); it seems to be part of the argument by the Lord Chancellor or Lord Keeper of the day, who says, "As if another man should blend his money with mine, by rendering my property uncertain he loses his own."

Then the course which Lord *Eldon* adopted in *White v. Lady Lincoln* (a) is also to be regarded. There Lord *Eldon* declared that the bills of a person who was agent, steward and solicitor of the Duke of *Newcastle*, and who had kept no accounts, must either be presumed to be paid, or if not, that it was contrary to equity to permit any demand to be made upon them, it having been his duty to his employer to have kept such regular accounts of his receipts and payments, dealings and transactions as would enable the representatives of the Duke to know the true state and result of all such accounts between the agent and his employer (b).

Putting all these matters together, and applying them to the present case, what do they amount to but this,—that it being unquestionable that the injury has, in the first place, proceeded from the act of the late Duke of *Leeds*, and the late Duke of *Leeds* having left matters in such a state, that it becomes hopeless, I may say, by anything like an approach to certainty, to determine what was the amount of the mischief done to the Plaintiff, his son, the only rule that can be adopted is this:—that the party who has done the mischief shall suffer for the mischief which he has committed; and although it may perhaps be not consistent quite with the accurate truth, yet that the sum which

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(a) 8 *Ves.* 363.

(b) 8 *Ves.* 374.

the Master has found shall be the sum for which the estate of the late Duke shall be answerable, he having created the difficulty.

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Throughout this case, and upon reading the whole of the evidence, I was struck with this :—that so far from there being anything like an attempt to make clear what was actually done by the late Duke, the Defendants have been acting upon a spirit of “tare and tret” in favour of their *cestui que trust*, and upon such mere book-keeping, vile shop notions as these :—that they are to be charged nothing, except what can actually be made out. My opinion is, that they have entirely mistaken the mark, and that as they have not chosen, and probably may not be able to make out exactly what was the amount of the mischief done by the late Duke, and the Plaintiff has given such evidence as lay in his power, the Master has, upon that, properly drawn his conclusions. I admit, that if it could be made out, distinctly, that there was some great and pointed error about which there could be no dispute, then it would be very well to say that the exceptions ought to be allowed; but upon going through the whole of the case, all that I can find is this :—that a great mischief was manifestly done, and nobody can say with certainty how much was done; if, then, I cannot have pointed out to me with certainty what precise error the Master has made, it is too much, in such a case as this, to say, that the whole is to go for nothing, and that the matter is to be sent back to the Master, just as if nothing had actually taken place.

With respect to the first exception which regards *Wilks'* book, my opinion is, that it is not a substantial objection, and that it cannot stand.

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With regard to the other exceptions, they all fall under the general observations which I have made, and which I intend to apply to the whole of the case, and must govern the substance of it.

Upon the best consideration, therefore, that I can give this case, after having read over all the papers, and endeavoured to follow, so far as I could, what I presumed to be the view which the Master had in coming to certain definite sums, as the ultimate amount of damage, but which, I confess, I have been unable to do to my own satisfaction, I have thought it due to the justice of the case, and to the character of the parties, to decide it upon these general grounds, and thinking that the conduct of the late Duke has made it impossible for this Court to act otherwise, I shall overrule all those exceptions.

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NOTE.—There was an appeal in this case, which came before the Lords Justices on the 13th and 18th *December*, 1851, and 12th *January*, 1852, but ultimately the case was compromised.

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SHAW v. FORREST.

**M**R. *D.* was the solicitor of some of the Defendants, who were resident out of the jurisdiction.

Dec. 1, 2.

Parties, though not formally served with a notice of motion, yet substantially made respondents, held entitled to their costs.

**T**he Plaintiff being about to bring on a motion, applied to Mr. *D.* to appear for these Defendants, and though not formally served with a notice of motion, a copy was furnished him. Mr. *D.* at first refused to appear for them, but he afterwards expressed his willingness to do so, and the Plaintiff's solicitor wrote him a note, stating when the motion would come on.

**M**r. *Cory*, in support of the motion.

**T**he MASTER of the ROLLS having refused the motion with costs,

**M**r. *Lloyd*, on behalf of Mr. *D.*'s clients, asked for his costs.

**M**r. *Cory* opposed them, on the ground that he had never been served with the notice of motion, and that the notice and letter were mere acts of curtesy.

**T**he MASTER of the ROLLS. In my opinion, these persons are entitled to their costs.

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## BOLD v. HUTCHINSON.

March 12, 13.

Where, upon the marriage of two persons, a third party makes a representation, upon the faith of which that marriage takes place, he will be bound to make good that representation.

A father represented to the intended husband of his daughter, that, on the death of himself and his wife, the daughter would have 10,000*l.* at the very least; that he had made no eldest son, and that all his children should share equally; and the intended

husband, at the time, made a memorandum in writing of the representation. Heads of marriage articles were prepared, by or by the direction of the father, providing, among other things, that he should covenant that the daughter would, at the death of himself and his wife, be entitled to 10,000*l.* and upwards. The settlement made in pursuance of these instructions did not contain any such covenant, but there was a recital that the daughter would be entitled to the 10,000*l.*, and the father was a party to the deed. The share coming to the daughter under her father and mother's marriage settlement fell short of 10,000*l.*, and no addition was made to it by the father in his lifetime or by will. Held, that the representation made by the father must be made good by him, and that his estate must make up the deficiency.

In cases of this description, in Courts of Equity, the moral obligation is co-extensive with, and not different from the legal obligation, where the representations are expressed in clear and distinct language; but vague and ambiguous representations made to persons, leading them to form an opinion or belief, though morally, are not legally binding.

**B**Y the settlement made in 1801, on the marriage of Lieutenant-Colonel Sir *William Hutchinson* and *Latitia Vaillant*, certain stocks, funds and securities were vested in trustees, upon trust, after the decease of the survivor of them, for the children of the marriage, as they jointly or as the survivor of them should appoint, and in default of appointment, upon trust for the children equally.

There were five children of the marriage, one of whom died, and another, *Theodosia Frances Hutchinson*, afterwards married the Plaintiff, the Rev. *Hugh Bold*.

On the treaty for the marriage between the Plaintiff and Miss *Hutchinson*, an interview took place between the Plaintiff and Sir *W. Hutchinson*, on the 16th of *December*, 1830, on the subject of the marriage.

Instructions were accordingly drawn up by the direction

tion of Sir *W. Hutchinson*, for the preparation of the settlement, which were intituled "Heds of Marriage Articles between the Rev. *Hugh Bold* and *Theodosia Frances Hutchinson*," and in which, among other things, were these words,—“The Rev. *Hugh Bold* settles a jointure of 500*l.* per annum (to commence at his death) upon Miss *H.*, during her natural life. During his lifetime, the wife to have an allowance to provide clothes, &c., of 60*l.* per annum. The jointure to be secured on the estate, and placed in the charge of the trustees. A covenant is to be drawn up, by which Lieut. General Sir *W. Hutchinson* guarantees that his daughter *T. F. Hutchinson* shall, at the decease of both parents, have a property of not less than 10,000*l.* sterling (ten thousand). Of course this includes what she will have through Lady *Hutchinson*, this property to be settled on her and her children,” &c.

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At Sir *W. Hutchinson's* request, the Plaintiff agreed that Mr. *Allen*, Sir *William's* solicitor, should be employed to draw up the settlement, and Sir *William* accordingly wrote to Mr. *Allen*, requesting him to draw it up, and inclosing “a sketch whereupon the settlements are by you to be framed,” being, as alleged by the Plaintiff, the “Heds of Marriage Articles” already referred to. This letter contained these words, “At the death of my present wife, and of myself, whatever we may die possessed of will be divided between our four children. *Theodosia's* portion whereof will then be ten thousand pounds.”

An indenture was accordingly made between the Plaintiff of the first part, Sir *W. Hutchinson* of the second part, *Theodosia Frances Hutchinson* of the third part, and trustees of the fourth part, whereby, after reciting that “*Theodosia Frances Hutchinson* would, upon

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upon the death of Sir *W. Hutchinson* and his wife," become entitled to a fortune consisting of stock in the public funds, monies and other personal property to the amount or value of ten thousand pounds sterling and upwards, and that upon the treaty for the said intended marriage, it was agreed, by and between the said Sir *William Hutchinson* and *Theodosia F. Hutchinson* and the Plaintiff, that the personal property which the said *Theodosia F. Hutchinson* would so become entitled to, upon the death of both her said parents, "should, immediately upon the death of Sir *W. Hutchinson* and his wife, be received by the trustees and invested upon the trusts thereafter declared," and, reciting the agreement as to the pin-money and jointure, is was witnessed, that, in pursuance and performance of the agreements, &c., Sir *W. Hutchinson* and *Theodosia F. Hutchinson*, thereby covenanted with the trustees, that all such sums of money, and other personal property and effects, as *Theodosia F. Hutchinson* should, upon the death of the survivor of her parents, become entitled to, or wherein she then had any interest, vested or contingent, expectant on the deaths of her parents, should, upon the death of the survivor of them, become vested in the trustees thereof upon the trusts thereafter contained. And *Theodosia F. Hutchinson* assigned the same sums of money, &c., to the trustees, upon trust to pay to *Theodosia F. Hutchinson* the interest, dividends and annual produce thereof for life, for her separate use, without power of anticipation, and after her decease, to the Plaintiff for life, and after the decease of the survivor, upon trusts for the benefit of the children of the marriage, as they should appoint, or should attain twenty-one, or marry, and in default of children, in trust for such persons as *Theodosia F. Hutchinson* should appoint, and in default of appointment, in trust for such persons as would, under the Statute of Distribution,

but **ion**, have become entitled to her personal estate, if she had died intestate and unmarried. The settlement then went on to settle the pin-money and jointure; but it contained no covenant on the part of Sir *W. Hutchinson* as to the amount of his daughter's fortune.

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On the 27th of *February*, 1840, the marriage took place, and there was issue one daughter, who died an infant, in *December*, 1841, and Mrs. *Bold* died in *August*, 1842.

Sir *W. Hutchinson*, by his will, dated in 1844, gave all the residue of his property to his wife for life, and after her decease, to his three children then living; but he gave nothing to the Plaintiff or his wife, or the trustees of their settlement. He died in *August*, 1845.

Lady *Hutchinson* died in *June*, 1852, without having exercised, or joined in exercising, the powers of appointment given by the settlement of *July*, 1801, and thereupon the Plaintiff became entitled to a life estate in his wife's one-fifth of the property comprised in that settlement, which amounted to about 5,181*l.* 14*s.* only. This being all the property to which Mrs. *Bold* was entitled, in her own right, the Plaintiff claimed a right on behalf of himself and the trustees of the settlement of *February*, 1840, that they should rank as creditors on the estate of Sir *W. Hutchinson*, for such a sum, as together with the one-fifth share, would make up the sum of 10,000*l.*, in which the Plaintiff claimed a life interest.

The Plaintiff alleged and verified the statement by his oath, that at the interview between him and Sir *William*, on the 16th of *December*, 1839, Sir *William* made the following statement:—

“ I pledge you my word, as an officer and a gentleman,



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man, that at my death and Lady *Hutchinson's*, my daughter will have 10,000*l.* at the very least. I have made no eldest son, and my children will all share equally." The Plaintiff, at the same time or immediately after, made a memorandum in writing in his pocket book of the representation and statement so made to him, and in the words above stated.

The Plaintiff alleged, that the treaty proceeded upon the footing of this representation, and upon the faith, and in consideration of it, the Plaintiff agreed to make a settlement on his intended wife, out on his real estate, of pin-money and jointure.

From the evidence it appeared, that during the preparation of the settlement of *February*, 1840, Mr. *Allen* died, and that Mr. *Shaw*, who succeeded to his business, had, at the wish of Sir *W. Hutchinson*, completed it, and the draft alone, when prepared, was without any other papers submitted by the Plaintiff to Mr. *Wilson*, a Conveyancer (since deceased), who made no material alteration in it. Both Mr. *Allen* and Mr. *Shaw* being dead, there was no direct evidence as to what were the instructions upon which the draft settlement was prepared; but among the papers which came to the solicitor who succeeded Mr. *Shaw*, was found one, the Exhibit marked C., being in fact the "Heads of Marriage Articles," already referred to, and which, as well as a paper marked B., and substantially of the same purport, was in the handwriting of Colonel *William Nelson Hutchinson*, the eldest son of Sir *W. Hutchinson*, who had acted for him in the treaty for the marriage, and had given the Plaintiff Paper B., and himself kept Paper C. This latter the Plaintiff, in his affidavit, stated was the paper inclosed in Sir *W. Hutchinson's* letter, taken and delivered by the Plaintiff to Mr. *Allen*, and therein called by Sir *William* "a sketch." The  
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Court assumed that it formed the instructions for the settlement, which however did not fully carry them out, by inserting a covenant by Sir W. as to the amount of Mrs. *Bold's* fortune. Some alteration also was made in the settlement before it was executed, to meet the requirements of an insurance office, from which the Plaintiff was negotiating a loan, by giving priority of their charge over the jointure.

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The Plaintiff, by his bill, sought to have his wife's fortune made up to 10,000*l.*, and, if necessary, to have the settlement rectified, and made conformable with the "Heads of Marriage Articles."

Mr. *R. Palmer* and Mr. *Selwyn*, for the Plaintiff, relied on *De Beil v. Thomson* (a).

Mr. *Rolt* and Mr. *Toller*, for all the substantial Defendants, cited *Luders v. Anstey* (b); *Maunsell v. White* (c); *Money v. Jorden* (d); *Partyn v. Roberts* (e); *The Marquess of Breadalbane v. The Marquess of Chandos* (f).

Mr. *Freeling*, for the trustees.

*The MASTER of the ROLLS.*

I think there is no difficulty in determining that the Plaintiff is entitled to a decree. I proceed upon a leading principle, repeatedly adopted and laid down both by the Courts of Common Law and of Equity, when dealing with matters of this description; though it is in some respects

(a) 3 *Beav.* 469; *S. C. nom. Hammerley v. De Biel*, 12 *Cl. & F.* 45.  
(b) 4 *Ves.* 501; 5 *Ves.* 213.  
(c) 1 *Jones & Lat.* 539.

(d) 15 *Beav.* 372, reversed by the House of Lords.  
(e) *Ambl.* 314.  
(f) 2 *Myl & Cr.* 739.

1855. respects varied in Courts of Common Law, by statute, but  
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 BOLD with which I have nothing here to do. The principle is
 v. this:—that where, upon the marriage of two persons, a
 HUTCHINSON. third party makes a representation upon the faith of
 which that marriage takes place, he shall be bound to
 make good that representation.

Now the state of the case here appears to be this:—A gentleman proposing to a lady, applies to her father for his consent to the marriage, and, as might naturally be supposed, the father informs the intended husband what her portion would consist of. After that, a settlement is made, and if there were nothing more than this settlement and the representation proved to have been made by Sir *William Hutchinson* at the time when the Plaintiff applied to him for his consent to the marriage, I should be of opinion, that Sir *William Hutchinson* and his estate would be bound to make good the representation then made. The principle upon which I proceed is that which is laid down by Lord *Mansfield* in the case of *Montefiori v. Montefiori (a)*, in which he says, that “the law is, that where upon proposals of marriage third persons represent any thing material, in a light different from the truth, even though it may be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it. It shall be as represented to be.”

I am far from saying that Sir *William Hutchinson* did represent any other than the real truth of the matter, but what he represented was, that the fortune of his daughter consisted of 10,000*l.* and upwards; and I find a marriage settlement afterwards executed, in which there is a recital that the lady will, at the death of the survivor

(a) 1 *Wm. Blackstone*, 363.

survivor of Sir *William Hutchinson* and Lady *Hutchinson* become entitled to a portion consisting of various particulars, amounting in value to 10,000*l.* sterling, or upwards. Sir *William Hutchinson* is a party to that settlement, which contains an express assertion that the fortune of the lady consisted, at least of that sum, and not that it would consist of so much if Sir *William Hutchinson* made it up to that amount by his will. The settlement also states, that upon the treaty of the marriage, it was agreed, between Sir *William Hutchinson*, and Mrs. *Bold* and the Plaintiff, that the personal property which Mrs. *Bold* would so become entitled to, on the death of her parents, (that is, the personal property to the amount or value of 10,000*l.* sterling and upwards), should be settled. Then I find, in the first witness part, that, in consideration of the marriage, Sir *William Hutchinson* and Miss *Hutchinson* severally and respectively covenant, that all these sums of money and the other personal property of Miss *Hutchinson* should be settled. I look in vain for any cause or reason why Sir *William Hutchinson* should have been made a party to this marriage settlement, unless for the purpose of verifying and guaranteeing the accuracy of the statement there recited, that the fortune of the lady was to be 10,000*l.* sterling and upwards, which fortune was to proceed and come from himself upon the death of the survivor of himself and wife.

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It has been contended that a statement, that a sum will be settled by will, will not amount to an undertaking or promise which will bind the person who made it: and to this extent I concur in the observation, viz., where there is no statement of a specific sum, as being actually the property of the lady, which is to be so settled. I look at the other documents referred to in this cause, and I only see in them a confirmation of the

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the statement that is there made. In the first place, I look at the Exhibits marked B. and C., which are "the heads of marriage articles between the Rev. *H. Bold* and *Theodosia Frances Hutchinson*," and I find that it is stated, that a covenant is to be drawn up, by which Lieutenant-General *Hutchinson* guarantees that his daughter shall, at the decease of her parents, have a fortune of not less than 10,000*l.* sterling. I find, also, that in the letter marked D., which was written and sent to Mr. *Allen*, the solicitor, who prepared the settlement, Sir *William* states, that at the death of his present wife and himself, "whatever we may die possessed of, will be divided between our four children. *Theodosia's* portion thereof will be 10,000*l.*" It is to be observed, in this case, that considering the length of time which has elapsed, and the necessary infirmity of human memory upon such subjects, it is absolutely necessary for the Court to proceed and act upon the written documents which are not susceptible of change. I see in these documents, as I think, a reasonable explanation why no covenant was introduced into the settlement. It was considered that the fortune of the lady did not depend on the will of Sir *William Hutchinson*, for here, in fact, is a statement that she was entitled to that sum of money on the death of the survivor of her parents; and although, undoubtedly, it would have been a more proper course to have introduced an express covenant on the subject, yet I can well understand, that both the conveyancer who prepared the settlement, and Mr. *Wilson*, who afterwards looked over it, considered that it was not necessary to introduce any covenant on the part of Sir *William Hutchinson*, inasmuch as the recital was positive and distinct, that the fortune of the lady consisted of that which was there stated. It was contended, that this is not the representation of an existing fact; but if I am right in the view that I take of this case,

case, it is equally the representation of an existing fact, whether the statement is that the lady, on the death of the survivor of two persons, is entitled to a sum of money amounting to 10,000*l.*, or that she is, at that moment entitled to it.

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I look upon the case in this way:—Suppose, upon the marriage of a lady, her intended husband applies to the father, and asks him, or without being asked the father states, that the fortune his daughter is entitled to is 10,000*l.*, and that thereupon a settlement is drawn up reciting that she is entitled to a sum of 10,000*l.*, could this Court allow the father afterwards to say that she is not entitled to any sum of 10,000*l.*, and that her fortune in fact amounts to nothing? It is to be observed, that if the contention of the Defendant be correct, this lady might now be alive with a large family of children, and not one farthing could she have required from her father or family. I have no doubt, that if she had lived, and had had a family, the circumstances would have been different, and that this question would never have arisen between the parties. And I apprehend that (as is fairly stated in the evidence of Colonel *Hutchinson*) his father would have been morally bound to have left the same sum to Mrs. *Bold* as to his other children, and that the intention would have been carried into effect. But moral obligations in matters of this description, as they are treated in Courts of Equity, are co-extensive with and not different from legal obligations, where they are expressed in clear and distinct language. No doubt vague and ambiguous representations might be made to persons on marriage, which might create expectations and belief which the person making them might be morally, though not legally, bound to execute; but where the matter is clearly and distinctly expressed, then in my opinion the legal obligation

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gation follows the moral obligation, and is co-extensive with it.

Now, it is to be observed (which makes the distinction in this case), that assuming the memorandum made by Mr. *Bold*, when the representation was made to him by Sir *William Hutchinson*, to be a correct statement of what he then said, it appears, that Sir *William* then stated, that the lady's fortune would at least be 10,000*l.*, that he intended to leave all his children equally. That statement being followed by a settlement of this description, in my opinion renders two matters obvious, one is, that the obligation to make good the 10,000*l.* is imposed on Sir *William*; but that a legal obligation to leave his daughter, Mrs. *Bold*, an equal fortune with the rest of his children does not follow. He merely states that as a general expression of his intention, but not as a thing which would bind him or his estate. It might be, that upon the death of Sir *William Hutchinson*, his fortune might be such that, if equally divided, it would have left Mrs. *Bold* a fortune of 20,000*l.* instead of 10,000*l.*, yet, in my opinion, she would only have been entitled to the 10,000*l.* which is there clearly expressed, and this distinction, as it appears to me, affords the rule which governs cases of this description.

In the case of *De Biel v. Thomson* (a) there was an express statement by the father that he intended to leave another sum of 10,000*l.* to be settled; upon the faith of that statement the marriage took place; thereupon the Court held him bound to perform that obligation. The case of *Munsell v. White* (b) marks the distinction; the statement made by the uncle was one leaving it entirely in his own will and pleasure to do exactly as he might think

(a) 3 *Beav.* 469.(b) 1 *Jones & Lat.* 539.

think fit, if altered circumstances should induce him to change his intention. That representation was made to the friends of the lady, who ought not to have been misled by it; the representation was of what he had done then, but that he did not intend to be bound by it for the future; and that, although he had by his will left his *Tipperary* estates to the intended husband, he might alter it, "if some unforeseen occurrence should take place." That distinguishes it from the present case. There are only two other cases to which I think it necessary to refer. In *Montefiori v. Montefiori* (a), the brother, on the intended marriage of another brother, stated to the friends of the lady that he owed him a sum of money (which was not the fact); he was compelled to make that good. In *Neville v. Wilkinson* (b) a person was asked to make out a list of the debts due from the intended husband. In doing so, he omitted a large sum of money due to himself, on the belief and the representation made by the intended husband, that if he made that statement, it would prevent the marriage taking place. After the marriage had taken place, he insisted on enforcing that debt against the husband, upon which Lord *Thurlow* granted a perpetual injunction to restrain him for ever enforcing that debt against him; Lord *Eldon*, in a subsequent case of the *Vauxhall Bridge Company v. The Earl of Spencer* (c), stated, "he remembered arguing that case with obstinacy, but Lord *Thurlow* thought, that having made a representation, a Court of Equity must hold him to it." All those decisions appear to me to indicate the principle which governs the present case.

It is impossible for me to adopt the view, which Mr. *Toller* wishes me to take, that the proposed mortgage
of

(a) 1 *W. Blackstone*, 363. (b) 1 *Bro. C. C.* 543. (c) *Jacob*, p. 67.

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of Mr. *Bold's* property to the insurance company for 10,000*l.* made a difference in the arrangements, because, in fact, the evidence of Colonel *Hutchinson* rebuts such a presumption.

I am of opinion, in the absence of any clear and distinct evidence, which unfortunately arises from the death of both Mr. *Allen* and Mr. *Shaw*, that the reasonable inference is, that the Exhibit D., the letter written by Sir *William Hutchinson* to Mr. *Allen*, did contain in it Exhibit C., which is the proposal in the handwriting of Colonel *Hutchinson*, which was afterwards found among Mr. *Shaw's* papers. He incloses a sketch. What is that sketch? I find that there were two sketches, B. and C., which were substantially the same. I find a letter written by Sir *William Hutchinson* to Mr. *Allen*, in which he states that he incloses a sketch for the purpose of preparing the settlement. The natural inference is, that it would be one of those two sketches which had been prepared by Colonel *Hutchinson*, who was authorized to act for Sir *William Hutchinson* in this matter. I find that document C., which answers exactly that description, among the papers of Mr. *Allen*, I find that it afterwards came to Mr. *Shaw*, and subsequently, to his successors in business. The reasonable and natural inference is, that that document was the document there referred to. Then, I am of opinion, that this settlement was prepared by Mr. *Allen* with the view of carrying those instructions into effect. A possible explanation of the omission of any express covenant by Sir *William Hutchinson* in the settlement, that the fortune of the lady should not fall short of 10,000*l.*, is to be found in the suggestion which I have already made, that it was believed that this sum did not, in fact, depend upon his will, but that the excess only beyond the 10,000*l.* depended on his further bounty,
and

and what he might leave, and that that further bounty was intended to be settled also ; this explains the whole, and shews why no covenant was introduced by Sir *William Hutchinson* guaranteeing that the fortune of the lady should amount to 10,000*l*. In fact, as I have before stated, Sir *William Hutchinson*, being made a party to the settlement, and joining in the covenant to the trustees that the fortune of the lady shall be so settled, seems to me to have been the mode by which the Conveyancer intended to carry into effect that clause of the settlement by which he guaranteed that the fortune should not be less than 10,000*l*. Why it was left vague seems to me to be explainable by the supposition, that her fortune might be a good deal more than 10,000*l*., but to that extent, at all events, it was to be settled, and that whatever more she might get, from her father's bounty, or on the death of her father and mother, was also to be settled.

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Upon the grounds and principles I have stated, I am of opinion, that where a statement is made, that statement must be made good ; and that, if the representation had been made by Sir *William Hutchinson*, that the existing fortune of the lady was 10,000*l*., I could not have allowed him, in his lifetime, to have denied the accuracy of that representation, but should have compelled that fortune to be settled ; and, being dead, I am compelled to hold his assets are bound to make good his assertion, that the fortune of the lady upon the death of the survivor of Sir *William Hutchinson* and Lady *Hutchinson* did amount to 10,000*l*. I must accordingly make a declaration to that effect.

In my opinion, it is not necessary to reform the settlement, and I studiously abstain from making any observation as to whether, if it were necessary to reform it,

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The result is, in my opinion, that I must make a declaration upon the grounds I have stated.

NOTE.—Affirmed by Lord *Cranworth*, on other grounds, *November* 7, 1855.

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COLE v. LEE.

SUBJECT to the life interest of herself and her husband, Mrs. *Tuder* had, in the events which happened, an absolute power of appointment over certain real and personal estate vested in trustees.

By her will, made in 1819, Mrs. *Tuder* appointed that the trustees should stand seised and be possessed of this property, in trust as follows:—"In the first place, out of all such real and personal property, as soon as conveniently may be after the decease of the survivor of us (*viz.* herself and her husband), to raise and set apart the sum of 5,000*l.* of lawful money of *Great Britain*, for the use and benefit of my niece *Elizabeth Cole* and of her issue, as after mentioned, and to raise and pay interest on the said sum of 5,000*l.*, at the rate of 5*l.* per cent. per annum, to be computed from the decease of such survivor as aforesaid, which interest shall be paid to my said niece or her assigns, during her life, for her and their own absolute use and benefit.

March 16, 19.

Under a direction to raise 5,000*l.* for the benefit of *A.* and her issue, followed by a direction to raise and pay interest at five per cent. on that sum, to *A.* during her life, with a gift over to her children of the "principal sum." Held, that interest at five per cent. was not to be charged on the estate during the whole life of *A.*, but merely until the 5,000*l.* had been raised.

"And from and after her decease, as to the said principal sum of 5,000*l.*, in trust for the sons of *Elizabeth Cole*, who should attain twenty-one, and her daughters who should attain that age or marry, equally. And in case they should be under age, &c., the 'interest and dividends of so much of the said last-mentioned trust money' as should not be then payable, should be applied in their maintenance, until their shares "of the said principal" should be payable.

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And as to all the residue of the property, "subject to the raising and payment thereof of the said sum of 5,000*l.* as aforesaid," in trust for other persons.

Mrs. *Tudor* died in 1823, her husband died in 1840, and *Elizabeth Cole* became Mrs. *Lee*.

After the death of Mr. *Tudor*, the Plaintiffs, who were interested in the property, subject to the charge of 5,000*l.* and interest, paid *Elizabeth Lee* 250*l.* a year down to 1854, when they paid the 5,000*l.* into Court under the Trustee Relief Act, and it was invested by the Accountant-General in Consols. But Mrs. *Lee* having insisted that she was entitled, out of the real and personal estate, during her life, to the payment of 250*l.* a year, or so much thereof as might not be paid out of the dividends of the Consols, a special case was prepared for the opinion of the Court: first, as to whether the real and personal estate, appointed by Mrs. *Tudor*, were still chargeable with the payment of the 250*l.* a year, during the life of Mrs. *Lee*; secondly, whether that property was wholly relieved from the charge by the payment of the 5,000*l.* into Court; or thirdly, whether it was only partially relieved to the extent of the dividends on the Consols.

Mr. *Lloyd* and Mr. *Pemberton*, for the Plaintiffs, argued, that the interest was a mere accessory to the capital, and was only charged on the estate until the principal sum had been raised.

Mr. *R. Palmer* and Mr. *Goldsmid*, for the Defendants, argued, that the direction was positive, to raise interest at 5*l.* per cent., and pay it to Mrs. *Lee* during her life. They cited *Arnold v. Arnold* (a).

Both

(a) 2 *Myl. & K.* 365.

Both sides commented on the terms of the instrument.

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There is considerable obscurity arising from some of the words of the will ; but I think that the construction to be put upon them is not open to much doubt. I see nothing in this will pointing to successive raising of interest, and it is obvious that if the construction put on it were to secure 5*l.* per cent. per annum to Mrs. *Lee*, it would be necessary, if the interest ever fell short, to make a further charge for the deficiency. It appears to me, that the construction to be put on this clause is this :—that when the sum of 5,000*l.* was raised, interest was also to be raised up to that period, at the rate of 5*l.* per cent. per annum.

The words of the will point, in the first place, to a life interest in the legacy. The words are these :—“ in trust . . . after mentioned.” That is to say, 5,000*l.* are to be raised for the benefit of her niece and her issue, “ as after mentioned.” That alone would be sufficient to shew that *Elizabeth Lee* was to take a life interest after the death, in this sum of 5,000*l.*, which was afterwards to be divided amongst her children.

The testatrix goes on thus, which are the words which create the ambiguity :—“ and to raise and pay . . . as aforesaid ” If the words stood there, I should entertain very little doubt that they meant, to raise and pay interest upon the same, from the death of the survivor, up to the time when it is raised, it being obvious that it could not be raised simultaneously with the death of the survivor, for some interval of time must necessarily elapse between the death and the raising of the money ; and the fact of appointing that interest

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interest at 5*l.* per cent. should be paid, would naturally accelerate the raising of the money as speedily as it could be accomplished.

She then says, "which interest, &c. . . . twenty-one years." Now the true effect of that clause is, that the testatrix did not contemplate successive raising of interest, which would be a very serious evil and inconvenience to the estate. It is obvious that such might be the effect, if I adopted Mr. *Goldsmid's* argument, because the trustees were bound to raise the 5,000*l.* at once, and set it apart, so that if the interest fell short of 250*l.* in any year, the additional interest could only be raised by a fresh mortgage or charge on the property. The amount of interest due at the time the 5,000*l.* was raised was ascertained, and it would be no greater expense to raise the sum of 5,000*l.*, together with the interest that had then accrued due, at the rate of 5*l.* per cent., than it would be to raise 5,000*l.* alone; but the difficulty of raising the deficiency of income subsequently would be very great, unless it was done by a prospective raising of a gross sum, which would also give rise to considerable expense and inconvenience. The clause to which I was referred as to maintenance has, on my mind, an effect opposite to what was intended. It directs that *the interest and dividends* should be paid for maintenance, but there is nothing to show that she anticipated a different rate of interest to be paid to the children for their maintenance and education, than to their mother. It is obvious that the expression "which interest," refers to the interest at 5*l.* per cent. up to the time when the capital was raised.

Again, the whole of the residue is given "subject to the raising and payment thereof of the sum of 5,000*l.* as aforesaid;" but the whole of the residue could not be

be applied, if there were to be subsequent and successive raisings of interest to make up the deficiency which must necessarily arise if the 5,000*l.* were vested in a permanent security. Admitting the principle of construction, that it is the duty of the Court, if possible, to reconcile all the parts of an instrument, I think that this can only be done by saying, that the passage has reference to the interest to be paid up to the time of raising the capital sum of 5,000*l.*, but no limit is to be placed on such interest at the rate of 5*l.* per cent., if the money is not raised, except the life of *Elizabeth Lee*. The result is, that the case must be answered on the first point in the negative, and on the second in the affirmative.

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MINET v. LEMAN.

Feb. 28.

March 1, 24.

THE Plaintiff, Mr. *Minet*, was tenant for life of a gavelkind estate, at *Brasted*, in *Kent*, with remainder over, and he was seised in fee of a freehold estate at *Hayes*, in *Middlesex*. He had taken proceedings (8 & 9 *Vict.* c. 118), au-

The Inclosure Commissioners can, under the provisions of the General Inclosure Act

thorize an exchange, though no inclosure is contemplated, which will be binding on persons under legal disability; and under their authority an exchange may be effected, by parties having a limited interest, of lands of common socage tenure for lands of gavelkind tenure in different counties.

Where, under this act, gavelkind lands in *Kent* are exchanged for common socage in *Middlesex*, the tenures of the exchanged lands are not altered, but the *Kent* lands remain of gavelkind tenure, and the *Middlesex* lands of common socage tenure. (*Per the Master of the Rolls, sed quere.*)

The 94th section of the 8 & 9 *Vict.* c. 118, is confined to the exchanges in cases of inclosure mentioned in the 92nd section.

The general words of a statute are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be put upon those words consistently with the intention of preserving the existing policy untouched; but the title and preamble of the General Inclosure Act being quite general, the words of the 147th section appear to be so general, as to make it impossible to limit them to exchanges of freeholds of the same species, notwithstanding inconveniences and seeming injustice to parties.

These possible evils and inconveniences are provided for by the appointment of Commissioners, whose duty it is to ascertain and approve of the propriety of the exchanges before they can be effected.

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ings to effect an exchange of these two estates, but before they had been perfected, the Defendant, Mr. *Leman*, contracted to purchase from him the *Kent* estate, for 4,000*l.*, subject to certain conditions of sale.

The only condition which it is necessary to mention is the sixth, which was in these words:—"The remainder of the property comprised in the particulars and plan, is in the course of being exchanged for fee simple property in *Middlesex*, under the provisions of the Act of Parliament for the inclosure, exchange and improvement of land, and which exchange has proceeded so far as the issuing of advertisements preliminary to the order for the exchange being confirmed by the Inclosure Commissioners. The effect of such exchange will be, to transfer to the property comprised in this sale, the title, which, up to the completion of the exchange, was or is applicable to the *Middlesex* property. The title, therefore, which the vendor will produce to the property comprised in this sale, will be that relating to the *Middlesex* estate, and the vendor shall not be required to produce, nor shall any objection or requisition be made or taken in respect of the title, applicable to the property mentioned in the foregoing particulars prior to the completion of such exchange." It then provided that the production of the order for the exchange, duly confirmed by the Commissioners, should "be deemed conclusive evidence that the exchange had been duly effected and completed under the above mentioned acts."

The order for the exchange was duly confirmed by the Commissioners, but the Defendant objected, that the Commissioners had no authority, under the Inclosure Acts, to make an order for the exchange of lands of common law freehold tenure, and lands of gavelkind tenure,

tenure, but only of lands of freehold tenure, for lands of the same species of tenure; and he insisted that the 147th section of the General Inclosure Act (8 & 9 Vict. c. 118), was to be restricted to that limited construction; and he refused to complete, on the ground of there being no title shewn (a).

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The Plaintiff filed his bill for specific performance, and the cause now came on to be heard, but the suit was treated as if it had been instituted to obtain the opinion

(a) The 147th section of the 8 & 9 Vict. c. 118, is in these words :—

"That it shall be lawful for the commissioners, upon the application in writing of the persons interested, according to the definition hereinbefore contained, in lands not subject to be inclosed under this act, or in lands subject to be inclosed under this act as to which no proceedings for an inclosure shall be pending, and who shall desire to effect an exchange of lands in which they respectively shall be so interested, to direct inquiries whether such proposed exchange would be beneficial to the owners of such respective lands; and in case the commissioners shall be of opinion that such exchange would be beneficial, and that the terms of the proposed exchange are just and reasonable, they shall, unless notice of dissent to the proposed exchange shall be given, under the provision hereinafter contained, cause to be framed and confirmed under the hands and seal of the commissioners, an order of exchange, with a map or plan thereunto annexed, in which order shall be specified and shewn the lands given and taken in exchange by each person so interested respectively; and a copy of such order, under the seal of the commission-

ers, shall be delivered to each of the parties on whose application the exchange shall have been made; and such order of exchange shall be good, valid and effectual in the law, to all intents and purposes whatsoever, and shall be in nowise liable to be impeached by reason of any infirmity of estate or defect of title of the persons on whose application the same shall have been made; and the land taken upon every such exchange shall be and enure to, for and upon the same uses, trusts, intents and purposes, and subject to the same conditions, charges and incumbrances, as the lands given on such exchange would have stood limited or been subject to in case such order had not been made; and all expenses with reference to such order and exchange, or the inquiries in relation thereto, or to any proposed exchange, shall be borne by the persons on whose application such order shall have been made or such inquiries undertaken: provided always, that no exchange shall be made of any land held in right of any church or chapel, or other ecclesiastical benefice, without the consent, testified in writing, of the Bishop of the diocese and the patron of such benefice."

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opinion of the Court upon the title, so far as it depended on the validity of the exchange.

Mr. *Roupell* and Mr. *Pole*, for the Plaintiff. The General Inclosure Act (8 & 9 *Vict.* c. 118) gives to the Commissioners power to authorize the exchange, first, of inclosure lands by award; and secondly, of non-incloseable lands, by order. The 147th section gives express authority in the latter case, without any restriction as to tenure. Under this section, gavelkind lands may be exchanged for freehold or common socage lands, for they are really of the same tenure. Gavelkind lands are freeholds, but with different incidents, as to descent, dower, curtesy, and the like. The distinction is between lands of socage tenures and villenage, which comprises copyhold and customary tenures; *Co. Lit.* (a); *Wright's Tenures* (b); 2 *Black. Comm.* (c); and this subdivision is preserved in the Inclosure Acts. Again, that gavelkind is freehold is proved by its being within the writ of assize. Gavelkind being therefore freehold, may, under the 147th section, be exchanged for other freeholds, wherever situate. Under a power of sale and exchange in a deed or will, gavelkind may be exchanged for freehold, then why should not the same thing be done under a Parliamentary power? But it will be objected, that this is impossible, because the rights of the parties in one estate would be varied by substituting another estate of a distinct and different tenure, but the answer is this:—That the tenures as well as the titles are shifted, and thus no change takes place in the rights of the parties (d). [*The Master of the Rolls.* The objection is, that by changing the tenures, gavelkind lands would be raised up

(a) *Co. Litt.* 53 b; 116 a; (c) Pages 79, 84.
s. 172, c. 11. (d) 8 & 9 *Vict.* c. 118, ss. 94,
(b) Pages 203—206 (4th edit.) 147.

up all over the country.] The same might be said of copyholds, yet the acts are positive (a). Exchanges have been made to a great extent on the faith of this construction, as appears from the returns to Parliament, and even eminent lawyers have taken titles depending upon the validity of such an exchange, and it would be dangerous and impolitic to throw a doubt on the subject.

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Secondly. The conditions of sale preclude the objection. They simply state the facts and studiously avoid guaranteeing any tenure; *Johnson v. Smiley* (b). The property is stated to be in *Kent*, and all lands in that county are presumed to be gavelkind; *Robinson on Gavelkind* (c). The tenure has not been altered even by the Disgavelling Statute 31 *Hen.* 8, c. 3; *Robinson* (d), which only took away the partibility, and not the other qualities or customs appertaining to lands in *Kent*, of the nature of gavelkind.

Mr. Palmer and Mr. Robson, for the Defendant. The power to exchange lands of gavelkind tenure for others of common law freehold tenure is not expressly given by the act to the Commissioners, and it would be contrary to the ordinary principles of construction to imply such a power from the general words of the act, and thereby alter the previous policy of the law; *Hawkins v. Gathercole* (e). It might as well be said that there is authority to exchange leaseholds for freeholds. Copyholds are clearly not within the 147th section of the General Inclosure Act, because the rights and interests of the lords of manors might be seriously prejudiced against their consent, and without their having the

(a) 9 & 10 *Vict.* c. 70, s. 9.(b) 17 *Beav.* 223.

(c) Book 1, Chap. 5.

(d) Page 75 (3rd edit.)

(e) Lords Justices, *January* 19th, 1855.

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the power to object, and this is shewn by the necessity of passing a subsequent act of the 9 & 10 Vict. c. 70, in order to make them subject to the provisions of the former act. If it should be held that the Commissioners are empowered to authorize such an exchange, on the application of persons having limited interests, the consequence would be, that lands of common socage tenure might be converted into gavelkind, and the country dotted all over with patches of gavelkind lands; this would be attended with very great inconvenience, and the tenure of gavelkind can only be destroyed by an express Act of Parliament; *Robinson (a)*. If, on the other hand, the tenures of each of the lands exchanged remain the same, this again would be attended with great injustice, because the rights of the parties in the exchanged lands would be most materially affected by the substitution of property having different incidents from that given in exchange, as in the cases of dower, curtesy, descent, and the power of an infant to alien. This might be effected, too, without their knowledge or consent, for the consent of all parties interested is not required, but all that is necessary is an advertisement in the county newspaper, together with the absence of dissent. If such a power could be exercised, the result would be, that a party entitled in remainder to an old family property, might, when his interest fell into possession, find it gone and a new one substituted for it, in a remote country and possibly with a defective title. Mortgagees, also, might find the property comprised in their securities changed, and no testator or settlor could be sure that the settlement made by him of his property would not be altered, as to the subject-matter, at the caprice of any party having a limited interest under it. A power attended with such

(a) Page 75.

such results must not be inferred from the general **words** of the act. The object of the act was not to empower the Commissioners to exchange entire estates **irrespective** of inclosure, especially if situated at a great **distance** from one another, but only small portions of **land** inconveniently situated for other lands in a more **convenient** locality. Under powers of sale and exchange **this Court** would never authorize such an exchange as **would** alter the existing rights of the parties interested.

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Secondly, the construction of the act being doubtful, **the Court**, at all events, ought not to compel the **purchaser** to accept the title; *Pyrke v. Waddingham* (a).

Thirdly, the conditions of sale do not remove the **difficulty**, for if the acts do not apply, the Plaintiff will **be asking** that the Defendant may take no title at all. **The** condition expressly asserts that "the effect of such **exchange** will be," to transfer the titles. It is no answer **to say**, that the untruth of the assertion might have **been** discovered; *Reynell v. Sprye* (b).

Mr. Roupell, in reply.

The MASTER of the ROLLS reserved judgment.

The MASTER of the ROLLS.

March 24.

This was a suit for specific performance of the **contract** by the vendor against the purchasers, and the **question** in the cause is, whether the Plaintiff can make **such** a title to the land sold, as equity will compel the **purchaser** to take.

The

(a) 10 *Hare*, 1.

(b) 1 *De Gex Mac. & G.* 660.

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The only question which arises as to the title depends upon the construction of the General Inclosure Act (8 & 9 *Vict.* c. 118), and the subsequent acts relating to the same subject, so far as they bear upon and explain the provisions of the first.

These subsequent statutes are the 9 & 10 *Vict.* c. 70, 12 & 13 *Vict.* c. 83, and 15 & 16 *Vict.* c. 79.

The question which arises is this: the land contracted to be sold is situated in *Kent*, and it has been taken in exchange for other land, situated in *Middlesex*. This exchange was effected under the General Inclosure Act, by order of the Inclosure Commissioners. It is asserted, and it is to be presumed, that the lands in *Kent* were of gavelkind tenure; and it is also asserted, and it is to be presumed, that the lands in *Middlesex* are of ordinary freehold tenure, or common socage, and the question is, whether the Inclosure Commissioners have authority, under the General Inclosure Act, to exchange lands held in common socage for lands of gavelkind tenure.

It was justly observed, that the statute of the 8 & 9 *Vict.* relates to two distinct subjects, namely, the inclosure of lands, and other matters not relating to lands inclosed, or subject to be inclosed, under this act. These latter matters include the exchange of land. The section under which the exchange is authorized to be effected is the 147th section, which is thus expressed—[*His Honor stated it.*] There is also the 150th section, which describes in what manner notices for exchange and division are to be given.

It cannot be denied, that the words of this clause are most general in their terms. No exception is made,
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but it applies generally to all lands and corporeal tenements and hereditaments, that is by reference to the clause of interpretation, which is the last but one. It is admitted, however, that this must be restricted to all freehold lands, and that it does not extend to the exchange of copyholds, a proposition which, if it requires confirmation, receives it from the circumstance that the subsequent act, the 9 & 10 Vict. c. 70, has been passed to extend the provisions of the first act to the exchange of copyholds, and prescribes the conditions upon which such exchange shall be permitted to take effect.

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It is also, I think, clear, upon the construction of the first statute (assuming the Inclosure Commissioners to have the power to exchange freeholds of different tenures, such as that before me), that the tenure of the exchanged land is not altered, but that the *Kent* land, taken in lieu of the *Middlesex* land, remains of gavel-kind tenure, and that the *Middlesex* land remains of the ordinary socage tenure. The tenure must remain unaltered, unless the contrary is distinctly enacted by the statute. The only clause which relates to this subject is the 94th section, which expressly provides, that in all cases where land is exchanged or taken in partition, or allotted in respect of or for the purpose of giving effect to inclosure lands, or taken in exchange or in partition, or allotted, shall be held of the same tenure as the lands in respect of which it is given in exchange, or in partition, or in allotment. This clause is, in my opinion, confined to cases of exchange, having reference to lands inclosed under the provisions of the statute, and it does not, I think, extend to cases of exchange provided for by the subsequent clauses of the act to which I have referred. The terms of the clause itself, its position in the act, all tend to the conclusion, that the exchanges there spoken of are the exchanges mentioned

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tioned in the 92nd section, which has reference solely to the case of lands to be inclosed under the provisions of the statute.

The absence, also, of any words to the like effect in the subsequent clauses, relating to the exchange of lands not incloseable or connected with any inclosure, satisfies me that it was not the intention of the legislature, by this statute, to make it possible the country should be dotted about with parcels of land of gavelkind or borough English tenure, but that, according to the proper construction of it, in the mere case of any exchange, under the 147th section, the tenure of the land remains unaltered, and that the owner of land in common socage obtains, in lieu of it, land of gavelkind tenure or borough English, and *vice versâ*.

Upon this state of things, it is argued for the Defendant, that according to the principle of construction to be applied to all statutes, the general words of the act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched, and that upon this principle rests the admitted construction of the 147th section, which excludes its application to copyholds, where the rights and interests of the lords of the manor might be seriously prejudiced, against their consent, and without their having the power to object.

This principle of construction, as a general proposition, cannot be disputed. The question is, its application to the present case. For the Defendant it is urged, with much force, that upon the construction contended for by the Plaintiff, great injustice will have
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been done to persons whose rights are but inchoate, and who may be deprived of them without power to object to a proceeding which very materially affects their interests. Thus, an estate in curtesy to a husband of a reversioner may be limited to one-half (when it comes into possession I mean): the inchoate right of dower to the wife may be reduced from one-half to one-third: and the heir may be compelled, instead of having the whole estate, to share it with a numerous class of brothers as tenants in common.

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The 158th section, which provides that notice of such exchanges shall be given by advertisement for three weeks previously, certainly does not obviate this difficulty, inasmuch as the persons so seriously affected by the exchange, in this view of the case, would have no means or opportunity of resisting the proposed exchange. It is also to be observed, that by the statute, no valid title is conferred by such exchange, and that if the title of the pieces of land given in exchange is defective, that defect is transferred to the piece of land taken in exchange. It is obvious, in this state of things, it might happen, that the rightful owner, from absence abroad or incapacity of mind, might be prevented from enforcing his rights, and when his eldest son sought to do so, and to recover the property taken in exchange, he would find, by reason thereof, his interest had been reduced to a fifth or a sixth of what he was entitled to if no such exchange had been effected.

It is needless to multiply instances where this might occur. It is obvious that they might be of frequent occurrence, not merely in the case where the rightful owner is not in possession, but even where the real owner was in possession, in all cases where, subsequent to an exchange, a descent of the estate had taken place,
and

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and the owner, either tenant in tail or in fee, had intended, by disentailing deed or by devise, to correct the alteration of interest produced by the exchange, but had been prematurely prevented by death or incapacity from carrying his intention into effect.

I felt this consideration so strongly, that I have taken time to consider the scope of the acts, and the force of the terms employed, more carefully than I was able to do in Court, during the hearing of the cause, before I expressed my opinion upon the clause in question.

The title and preamble to the statute are quite general; they seem to point to the motives for enabling the exchanges provided for by the 147th section to be made, as would extend to exchanges of lands of different tenure. Upon referring again to clause 147, I am unable to limit the words of it to mere exchanges of one species of freehold tenure to others of the same species of tenure. It cannot, I think, be doubted, that under this clause, lands in gavelkind may be exchanged for other lands in gavelkind, as well as land in common socage may be exchanged for land in common socage. In like manner land in borough English may be exchanged for land in borough English. I think it would be a forced and arbitrary construction put upon the words used in this clause, if I were to hold that although this may be done, nevertheless no exchange can take place between lands in common socage for those in gavelkind or borough English. It would be, in truth, introducing an additional word into the clause, and, by implication, to limit the effect of the general expressions made use of by the legislature.

I have noticed the evils and inconveniences which might arise in some cases from exchanges, but it is proper

proper to observe, upon the other side, the inconveniences that might arise from holding the opposite construction and withholding the power to make such exchanges. Two owners of large estates, one in *Middlesex* and the other in *Kent*, might each possess a small plot of ground in the centre of the other's estate, close to the manor-house of the owner, a piece of ground of great value to the owner of the surrounding property, and, in truth, essential to the complete enjoyment of it, but of little or no value to any other person. To enable such an exchange to be effected seems to be the sort of case which lies within the primary scope and object of the act. In this supposed case, assuming the rightful owner not to be in possession of the estate, to improve which the exchange was made, it is scarcely possible to conceive how it could fail to be for his benefit that such exchange should be effected, and that the whole estate of the one should be united together in *Kent*, and should be subject to the same tenure; and the same thing might happen with reference to the *Middlesex* property. Cases which, if not exactly like that which I have suggested, yet very closely analogous to it, are of frequent occurrence. The statute was framed to meet the ordinary purposes and convenience of mankind, and the inconveniences of excluding such a power of exchange would, I think, be much greater and of much more frequent occurrence, than would attend the indiscriminate exercise of it, even in the cases to which I first adverted.

The legislature, also, seems, from the wording of the clause, to have, to some extent, foreseen and to have endeavoured to provide against the possible evil that might arise from such indiscriminate exercise of this power of exchange, by providing that this power shall only be vested in persons carefully selected for that purpose,

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purpose, and by directing in what manner and under what safeguards they shall be required to exercise it. This power is vested in the Commissioners appointed by the act, and these are to consist of three persons, one of whom receives a salary of 1,500*l.* per annum, and the chairman of whom is to be the chief Commissioner of the Woods and Forests. They are also required to make an annual report of their proceedings, and no exchange is to be sanctioned or made by them until they shall have made inquiries, and shall have satisfied themselves that the proposed exchange will be beneficial to the owners of the respective lands, whosoever those owners may be. A large discretion, therefore, is reposed by the legislature, with reference to these exchanges, in these Commissioners to give or withhold their sanction, and this discretion it is their duty to exercise in the manner pointed out by the acts; and I do not hesitate to express my opinion, that it would be an improper and indiscreet exercise of that power to allow an estate in *Kent* to be exchanged for an estate in some other and possibly distant county without first satisfying themselves that none of the evils I have been referring to could arise. But no such case is alleged to have occurred, and if it had, I see no principle upon which I could limit the expressions contained in this clause of the statute, or circumscribe or take away the power of the Commissioners, because it has been or may be rashly exercised by them. The discretion reposed in the Commissioners, as I read the clause, is not limited to the wishes, opinions or views of the persons who are enjoying the respective properties at the time the application is made for the exchange; but it is the duty of the Commissioners to see that the exchange would be advantageous, that is, to any person who may be the owner of the property, even if a stranger to the exchange should, by a paramount title, have a right to the

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the land so sought to be exchanged. I assume that the Commissioners duly perform the duty so imposed upon them by the legislature; but if in any instance they might fail to do so, the possibility of such an event cannot influence a Court of Justice in construing this clause, or enabling it to limit or evade the plain comprehensive words of the statute.

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My observations upon this subject plainly include the lesser matter which was but slightly argued before me. I mean the power of exchanging lands in one county for those in a county next adjoining.

The result of this is, that, in my opinion, a good title is shewn to the land, and, assuming no other question to arise, I shall make a decree for specific performance. I think this is not a case to give costs upon either side.

I presume the Plaintiff will take a decree to settle the conveyance, in case the parties differ.

NOTE.—Affirmed by the Lords Justices, June 28, 1855.

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22, 23, 31.

The Plaintiffs sought to set aside a conveyance made by their ancestor, as they alleged, while a lunatic, under undue influence, and for an inadequate consideration. The Defendant, who claimed under a derivative title from the purchaser, insisted, that he was a purchaser for valuable consideration without notice. No notice, actual or constructive, having been proved, the Court refused to interfere, and dismissed the bill with costs.

The absence on a deed of

a receipt for the consideration, though it is notice of its non-payment, is not constructive notice of other irregularities in the transaction.

The doctrine of *Kennedy v. Green* (3 Myl. & K. 699) requires to be administered with the greatest care and delicacy, and to be so acted on as, on the one hand, to protect a purchaser for valuable consideration against all the world, and, on the other, so as not to encourage fraud, by permitting a purchaser to disregard the plain and obvious marks and symbols of it.

Little reliance is to be placed on the unsupported testimony of one witness of an oral admission by the Defendant of the Plaintiff's case.

Evidence of the general reputation of the insanity of a person, in the neighbourhood in which he resided, is inadmissible to prove that a person was cognizant of that fact.

GREENSLADE v. DARE.

THIS cause, reported *ante*(a), on an interlocutory application, now came on for hearing. It will be necessary to state the facts somewhat more fully.

In 1815, the Rev. *Simon Slocombe Richards* was the rector of *Chepstable*, and he was seised in fee of the manor and advowson of *Chepstable*. On the 24th of June, 1815, in consideration of 1,000*l.*, he sold and conveyed the manor and advowson of the rectory to *Claridge*, in fee, and he devised the rectory, glebe, tithes, &c., to him during his life, or so long as he should continue rector, at a rent of 100*l.* a year. There was no receipt for the consideration money indorsed on the deed.

In 1818 *Claridge*, in consideration of 1,200*l.*, sold and conveyed the property so purchased by him to the Rev. *Charles Templer*, and, in 1833, the Rev. *Charles Templer* sold and conveyed the property to his brother, *James Templer*, who, in 1849, sold and conveyed it to the Defendant *Dare*, in consideration of 2,550*l.*

On

(a) 17 Beav. 502.

On the 9th of *February*, 1852, a commission *de lunatico inquirendo* having issued, the Rev. *Simon Slocombe Richards* was found to be a person of unsound mind, from the 1st of *January*, 1825.

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Mr. *Richards* died on the 19th of *April*, 1853, and the Plaintiffs, who were his co-heiresses, instituted the present suit on the 20th of *July*, 1853, praying a declaration, that the sale of the advowson was void and ought to be set aside, and for a recovery and delivery up of the title deeds, the Plaintiffs "offering to submit to such terms, if any, as this Court might think fit to impose upon them, as to the repayment of any such part of the purchase-money of the said advowson, as was applied for the benefit of Mr. *Richards*."

The grounds on which the Plaintiffs sought to set aside the deed were, first, that it had been fraudulently obtained from Mr. *Richards* by *Claridge*, with whom Mr. *Richards* was at that time residing, for a greatly inadequate consideration, the value being alleged to have then been 3,000*l*. Secondly, that Mr. *Richards* was, at that time, and afterwards continued, a notorious lunatic, and incapable of entering into a valid contract. Thirdly, that *Dare* had either actual notice of the invalidity of the transaction, or, at least, that the suspicious circumstances of the case, such as the absence of any receipt on the purchase deed, the non-residence of the rector, and the apparent inadequacy of the consideration, put him upon inquiry, and bound him by the information, which he would have obtained if he had performed the obligation of inquiring into the circumstances, and in fact fixed him with constructive notice.

On the part of the Defendant *Dare*, it was insisted, first, that the original transaction was perfectly free from fraud

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fraud, and was valid. Secondly, that Mr. *Richards*, at the time, was not insane, though in a bad state of health. Thirdly, that the Defendant was a purchaser for valuable consideration, without notice of the invalidity, if any, of the original transaction, and that this Court would not interfere, as this defence was available in equity as well against a legal as an equitable title. Fourthly, as to the validity of the original conveyance of 1815, involving a simple legal question, that this Court had no jurisdiction to determine it, but the Plaintiffs must be left to their legal remedies. Lastly, he relied on the lapse of time, and the laches which had occurred.

The case was argued by

Mr. *R. Palmer* and Mr. *Karslake*, for the Plaintiffs,
 and

Mr. *Lloyd* and Mr. *C. Browne*, for the Defendant
Dare.

The following authorities were cited. As to the alleged lunacy and its consequences, *Snook v. Watts* (a); *Jacobs v. Richards* (b); *Greenslade v. Dare* (c); *Frank v. Mainwaring* (d); *Price v. Berrington* (e); *Towart v. Sellars* (f).

As to the constructive notice, *Kennedy v. Green* (g); *Penny v. Watts* (h); *Ware v. Lord Egmont* (i).

As

(a) 11 *Beav.* 105.
 (b) 18 *Beav.* 300.
 (c) 17 *Beav.* 502.
 (d) 2 *Beav.* 115.
 (e) 3 *Mac. & Gor.* 486.
 (f) 5 *Dow. P. C.* 231.

(g) 3 *Myl. & K.* 699.
 (h) 1 *Mac. & Gor.* 150; 1
Hall & Twells, 266.
 (i) 4 *De Ger Mac. & Gor.*
 460.

As to the defence of purchaser for valuable consideration, *The Attorney-General v. Wilkins* (a); *Joyce v. De Moleyns* (b).

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As to proceeding at law to determine the legal validity of the deed, *The Corporation of Arundel v. Holmes* (c); *Tatnam v. Wright* (d).

They also cited *Metcalfe v. The Archbishop of York* (e), as to the validity of the demise of the living; and *Johnson v. Baker* (f); *Cholmondeley v. Clinton* (g); *Sugden's Vendors* (h), on other points.

The MASTER of the ROLLS.

January 31.

This suit was instituted for the purpose of impeaching the sale of an advowson in June, 1815, on the ground of undue advantage having been taken of the condition and mental incapacity of the vendor. The bill was not filed till July, 1853, that is, thirty-eight years after the transaction. As, however, the title of the Plaintiffs, as the heirs at law of the vendor, did not accrue until his death, which did not take place till the 19th of April, 1853, when, for the first time, their right to institute this suit accrued, no blame can properly be attributed to them for the delay.

The Plaintiffs allege, that Mr. *Richards* was of unsound mind at the time when he executed this conveyance, and also that *Claridge* stood in such a relation towards

- (a) 17 Beav. 285.
- (b) 2 Jones & Lat. 374.
- (c) 4 Beav. 325.
- (d) 2 Russ. & Myl. 1.
- (e) 1 Myl. & Craig, 547.

- (f) 4 Barn. & Ald. 440.
- (g) 2 Mer. 171; 4 Bl. (O.S.)
- 1.
- (h) Page 1057.

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towards him, as afforded an opportunity of taking peculiar advantage of him, and that consequently, the deed of the 24th of *June*, 1815, was and is absolutely void at its commencement, and from the date thereof, until the present time :—that the Defendant *Dare* must be fixed with notice of the fact, from the circumstance of the notoriety of Mr. *Richards*' insanity in the neighbourhood where the Defendant resided, and also by reason of the various irregularities in the transaction appearing on the face of the deed, which either gave or ought to have given notice to any prudent person of the defects which tainted the original transaction, inasmuch as no reasonable person could have failed to inquire into the circumstances attending it ; and that, if an inquiry had been instituted, it would have revealed the incapacity of the vendor and the defects in the title of the purchaser.

The Defendant takes issue on all points. He disputes the invalidity of the original transaction, but he further contends and asserts the sanity of Mr. *Richards*, and the *bona fides* of the sale. But assuming it to be invalid, he further contends and asserts, that he is a purchaser for valuable consideration without notice, and that consequently the Plaintiffs cannot proceed against him in equity, but must be left to such remedies, if any, as may be open to them at law.

Though a great mass of evidence has been gone into on both sides to establish the sanity or insanity of Mr. *Richards* at the date of the transaction, in 1815, I shall not go into that question or comment upon the evidence. It is needless that I should state either the view that I should have taken, had I been compelled to decide upon the evidence myself, or the reasons which would have influenced me, had I ~~sent the case~~ for further investigation,



vestigation to a jury, for this reason:—that on the second point, I am of opinion, that the Defendant has established his plea, and that the evidence in this case fails to fix him with notice, either actual or constructive, of the original transaction, or with such notice as, without being direct, may be said to have set a prudent person on inquiry, which, if done, would have disclosed the defects; this was the principle on which *Kennedy v. Green (a)* was decided.

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The grounds on which I am asked to fix the Defendant with notice are several. In the first place, in the affidavit of the Plaintiffs, they state that at an interview with the Defendant, in April, 1852, shortly after the inquisition *de lunatico inquirendo* had been concluded, upon the state of mind of Mr. *Richards*, the Defendant, Mr. *Dare*, stated, that Mr. *Meek King* could give evidence of the insanity of *Simon Slocombe Richards* for forty years past. This affidavit is expressly contradicted, but, taking it first by itself, I should have paid but little attention to it, as it is explainable, by attributing the Defendant's expression to some comment made by him on the evidence given at the inquisition and the report in the newspapers, which he had been lately reading, and which was the subject on which the Plaintiffs called to see him, such expressions might be easily misunderstood or misapplied by the Plaintiffs into an admission in their favour. However that may be, unless there be some very peculiar circumstances attending the alleged declaration of any party to a cause, I pay very little attention to the affidavit of one party stating that the adverse party has admitted the whole question in the contest between them to be against himself. I treat, in the same manner, another species of evidence,

(a) 3 *Mylne & Keen*, 699.

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evidence, which sometimes occurs where evidence is given, that a witness, who has given testimony very material for the adverse party, has admitted that he has perjured himself, and that his evidence, or the contents of his affidavit, are false. Of this species of evidence I have had one or two instances before me. Such evidence, unless corroborated by other circumstances which explain and render rational the alleged declaration, is always treated by me as unworthy of notice in drawing any conclusion of fact.

The next species of evidence, on which the Defendant is sought to be fixed with notice, is the general reputation of the insanity of Mr. *Richards* in the neighbourhood in which he resided. This, also, is a matter which I think it my duty to disregard. Evidence of general reputation is not admissible to prove a fact, unless it be such a matter as the boundary of a manor, or the like. To admit evidence of general reputation, to fix a Defendant with knowledge of a fact, while that evidence would not be admissible to prove the fact itself, appears to me to be a violation of the first principle which regulates the reception of evidence and the administration of justice. This is the whole evidence which tends to direct or actual notice to the Defendant Mr. *Dare*, and all actual notice is distinctly and positively denied by him. It is therefore clear, in my opinion, that on the point of direct or actual notice, the Plaintiffs' case fails.

The next and more material point is that which cannot properly be called constructive notice, but those facts which it is alleged ought to have induced a prudent man to have inquired further, and which would, in that case, have disclosed the fact of the insanity of Mr. *Richards* when he executed the deed of 1815. The
 leading

Leading case to support this doctrine is *Kennedy v. Green* (a), the decision of which, as far as I know, has always been acquiesced in. This appears to me, however, to be a doctrine which requires to be administered with the greatest care and delicacy, and probably each case must stand upon the peculiar facts belonging to it. The state of the deed under which the vendor claims may, as in the case in *Kennedy v. Green*, afford such evidence of fraud, that the Court would hold, that the not having made inquiry into the cause of the matter so appearing can be attributed only to a wilful blindness of the purchaser, or a determination not to know the actual existence of the fraud, the traces of which were manifest to him. I can conceive and can suggest other circumstances that might probably produce a similar result. The facts and circumstances of each case must be carefully examined, and so acted on, so as, on the one hand, not to impair the valuable doctrine which protects a purchaser for value without notice against all the world, and on the other hand, not to encourage fraud, by permitting a purchaser to disregard the plain and obvious marks and symbols of it.

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In this case, three circumstances are referred to as presenting those traces of fraud, and it is urged, they are so manifest, that, on the doctrine I have referred to, Mr. Dare must be held disentitled to avail himself of the plea, which he could not have urged if he had done what it was his duty to do, and had inquired into facts and thereby discovered the defects, which would have invalidated the original deed. It is contended, and I think with reason, that this Court ought to give peculiar effect to such circumstances when combined; and, though

(a) 3 *Mylne & Keen*, 699.

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though it might disregard one by itself, yet the weight to be attributed to the one alone is increased by the combined effect and addition of the inferences properly to be drawn from the other two. It is necessary, however, to consider them separately, in order accurately to form an estimate of what would be their combined effect.

Those three circumstances are as follows :—First the absence of any receipt for the purchase-money indorsed on the deed ; secondly, the non-residence of the incumbent ; and thirdly, the inadequacy of consideration. The first of these circumstances is that which has been strongly relied upon, but, in my opinion, it amounts to little, for the purpose for which it is alleged. If the purchase-money had been unpaid, and the representative of the Defendant *Simon Slocombe Richards* had claimed a lien upon the property for the unpaid purchase-money, this fact would have been very material, for the purpose of shewing that the purchaser had notice of that lien : but the purchase-money in this case has in fact been paid, though not all at the time of the original transaction, and an inquiry by the purchaser would naturally have been directed to the fact of whether such purchase-money had or had not been paid and no further. I think that it cannot go beyond that, and I am at a loss to conceive, by what process of reasoning, a doubt as to the payment of the consideration could lead a person to suspect that the vendor was of unsound mind, or that he was under undue influence when he executed the deed.

The non-residence of the incumbent also, taken by itself, appears to me to be of little importance. At that time, it was by no means unusual for an incumbent to be absent from his living, and if the service of the
 Church

Church was duly performed, I apprehend that, practically, neither the ordinary nor any other person could have interfered.

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The third circumstance, in my opinion, is more material. It appeared to me, on the evidence, that the living itself was demised, for the life of the incumbent, at an inadequate rent: and it is urged, that the whole transaction being one, this circumstance, taken into consideration in conjunction with the non-residence of the incumbent, and the doubt as to the payment of the consideration, ought, in any reasonable mind, to have created considerable doubt and hesitation. With respect to the advowson itself, I have not satisfied myself that the price was inadequate. The fact that it was sold for a much higher price when the incumbent was advanced in years, leads me to no such conclusion. The circumstance that the advowson was worth 2,550*l.* in 1849, is no proof that the advowson was undersold at 1,000*l.*, when the incumbent was thirty-four years younger. It is true that, by the transaction, the profits of the living were also taken at the rent of 100*l.* per annum, and this, in any view of the case, appears to me to have been an inadequate rent, nor does it appear to me, that the profits derived from this source could have been less than 100*l.* per annum: still when I observe that three years after the transaction the first vendor, *Claridge*, sold to a second purchaser, at no higher increase than 200*l.* for the whole bargain, without any suspicion of fraud or any allegation of unjust influence having been employed by Mr. *Templer* to induce *Claridge* to sell, and when I also consider, that the original transaction took place thirty-four years before the Defendant purchased, and that possession accompanied the deed, and that no complaint had been made respecting

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respecting the transaction, either by the vendor or by his friends, I feel satisfied that I should be carrying the doctrine of *Kennedy v. Green* to a dangerous extent, and one which might unsettle titles in a very alarming manner, if I were to hold, that a purchaser, after such a lapse of time and on such grounds of suspicion, was bound to shew, that he had made full inquiry into the circumstances connected with the original transaction, before he completed the purchase which he had contracted to make. Nay more, I think, that unfavourable inferences might be drawn from the circumstance of his having made such an inquiry, and that it might be suggested, that he had other grounds, besides those appearing from these circumstances, to suspect the insanity of the original vendor. I think he could not have resisted specific performance of the contract on the ground of the inferences to be drawn from those facts, although the first would have entitled him to require proof that there existed no lien upon the property for unpaid purchase-money.

If an opposite decision were now made by me and supported, it would be impossible, I think, hereafter, for a purchaser to be safe, if the slightest informality appeared in the transaction through which the title was deduced, even though after the lapse of thirty years. I am of opinion that the doctrine established in the case of *Kennedy v. Green* does not lead me to that result: and the more fully I have considered the cases, the more I feel convinced, that the Defendant *Dare* is entitled to rely upon the plea of purchase for valuable consideration, without notice of the defects attending the original transaction of 1815; all which, for the purpose of considering this question, I have assumed to be true, but as to the truth of which, as I have already stated, as an independent

independent question, it is not, I think, proper for me to express the opinion I have formed upon it.

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The result is, that this bill must be dismissed, and as a matter of course, in a case of this description, must be dismissed with costs.

PARKER v. BLOXAM.

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11.

THE testator, Mr. *Wilkins*, died in 1809. By his will, he gave his real and personal estate to three executors (*Bloxam, Gray and Cull*), on trust to convert it into personalty, and to invest the proceeds in real or government securities, and he gave one-eighth to his daughter *Sarah Mew*, the wife of *Benjamin Mew*, absolutely, and another one-eighth to *Sarah Mew* for life, with remainder to her children. The testator authorized his trustees to lend and advance, at interest, such parts of the trust monies as they should think proper to *A.* and *B.*, who were respectively his son and son in law. Held, that this authorized a several loan to either.

Three executors were authorized to lend trust monies to *A.* One of the executors (*C.*) employed part of the trust monies in his business. In 1812 *A.* and *C.* entered into partnership, when *A.* took upon himself the debt and gave security for the money to the executors. The amounts, with further advances, were employed in the business, but the whole, with interest, was fully repaid. The *cestuis que trust*, after long delay, insisted that they were entitled to a share of the profits made by the employment of the trust funds in trade; but the Court held, that the transaction amounted to a loan to *A.* under the power, and dismissed the bill with costs.

The Court looks with considerable jealousy at a release, executed by a young lady, at or shortly after attaining twenty-one, upon a settlement of accounts between her and her trustees.

A testator died in 1809; his grand-daughter came of age in 1829; she then executed a release and married in 1836; her father died in 1850, and in 1852 she instituted a suit to make his estate liable for the profits made by him (he not being a trustee) by the employment of part of the trust monies in trade. The Court held, under the circumstances, that assuming her right, there was nothing to justify the delay in instituting the suit.

A. B., entitled to a share of a residue, made a settlement of the balance appearing upon a settlement of accounts with the executors, upon himself and afterwards on *C. D.*, a volunteer. Held, that *C. D.* could not, against the will of *A. B.*, open the settlement of accounts with the executors.

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the trust monies as they should think proper, unto *Robert Bird Wilkins*, and *Benjamin Mew*, and to accept and take such security or securities for the same as they should think right and proper. The will was proved by Mr. *Cull* and the two other executors, and, under a power in the will, the executors carried on the testator's business until *February*, 1812, when his son, *Robert Bird Wilkins*, attained twenty-one, at which time *Robert Bird Wilkins* and *Benjamin Mew* and the survivor were to have the right of pre-emption of the testator's businesses.

The executor, Mr. *Cull*, carried on the business of a brewer, and after the death of the testator, he took 3,000*l.* belonging to the testator's estate and employed it in his business. On the 10th of *October*, 1812, Mr. *Mew* entered into partnership with Mr. *Cull* as a brewer, and the day after Mr. *Mew* took upon himself the debt due from Mr. *Cull* to the testator's estate, and gave to the executors a promissory note for 3,279*l.* 9*s.*, the amount of principal and interest then due. In 1814, he gave an equitable mortgage, and in 1816, a legal mortgage, to the executors for that sum and further loans.

Mrs. *Mew* died in 1815; she had two children, viz. the Plaintiff, Mrs. *Parker*, and the Defendant *Benjamin Thomas E. Mew*. Mrs. *Parker* attained twenty-one on the 18th of *May*, 1829. At that time certain accounts were submitted to her, the items of which were correct, but they contained no statement, that part of the testator's estate had been advanced to Mr. *Mew*, and had been employed by him and *Cull* in the brewery business. The accounts shewed a balance of 2,782*l.* due to the Plaintiff. On the 24th of *September*, 1829, by a deed-poll, reciting the will and other matters,

matters, and that the executors had made up their accounts, which Mrs. *Parker* had examined and approved of, and that she was satisfied that her share amounted to 2,782*l.*, she, in consideration of that sum, released the executors from all claims and demands, in the usual form. Although cheques were given for 2,782*l.*, that sum was not actually paid over, but 2,500*l.* of it was treated, as between herself and her father, as a loan by her to him. Her father gave her a promissory note for that amount, and from the year 1829, till her marriage in *January*, 1836, he regularly accounted to her for the interest thereon. At the time of her marriage, the account was again stated between the Plaintiff and her father, and Mr. *Parker*, her husband, was aware of it. The sum of 2,500*l.*, due from the Plaintiff's father on his promissory note, was then settled on Mrs. *Parker* for life, with remainder to her children, and the balance in his hands, amounting to 440*l.*, was paid to Mr. *Parker*. The 2,500*l.* was allowed, both by Mr. and Mrs. *Parker*, to remain in the hands of Mr. *Mew*, and to be employed by him in his trade from that period down to the death of Mr. *Mew*.

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Mr. *Mew* died in 1850, and down to that period interest was regularly paid by him on the 2,500*l.* The principal sum was also duly paid, and no part of the trust fund was lost.

In *August*, 1852, Mrs. *Parker* and her children instituted this suit against the surviving executors of the testator's will, the executors of Mr. *Mew*, and others, without making the representatives of Mr. *Cull* (who was dead) parties, and the substantial relief sought for was, to set aside the release, to open the accounts, and to obtain a share of the profits of the brewery proportionate

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tionate to the trust monies employed therein during the period they were thus employed.

It is necessary to advert to the circumstances connected with the share of *Benjamin Thomas E. Mew*, the other child of Mrs. *Mew*. He attained twenty-one in 1832, and in 1833 he executed a deed, which after reciting that he was, under the testator's will, entitled to two sums of 2,700*l.* and 433*l.*, he assigned those sums, and all "other the sums of money, securities and personal estate whereof he was possessed, or which he was in anywise entitled to, by virtue of the will," to his father, upon certain trusts, under which the Plaintiff, in the event of *Benjamin Thomas E. Mew* having no issue, would be entitled to one-half of the settled funds. *Benjamin Mew* had never been married, and the relief sought by the Plaintiff was also based upon her contingent interest in the funds, subject to this voluntary settlement, and which interest had been included in her own marriage settlement.

Mrs. *Parker* died pending the suit, and her husband (a bankrupt), having taken out administration to her estate, revived the suit, and now brought it to a hearing.

Mr. *R. Palmer* and Mr. *Rogers*, for the Plaintiff. First. A release executed by a child soon after coming of age, with an imperfect knowledge of the circumstances, arising from the suppression of material facts, and having no assistance except that derived from a parent, whose influence will be presumed, *Hoghton v. Hoghton (a)*, will be set aside; *Wedderburn v. Wedderburn (b)*.

Secondly.

(a) 15 *Beav.* p. 300. (b) 2 *Keen*, 722; 4 *Mylne & Craig*, 41.

Secondly. The trust money being traced into a trade, the trustee must account for the profits made by it; *Wedderburn v. Wedderburn*; *Jones v. Foxall* (a). The same rule applies to persons obtaining trust money, with notice of the trust, and employing it in their trade. Mr. Mew's estate is therefore liable to account for the profits made by him from the employment of the trust money in his brewery.

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Thirdly. The money cannot be considered as a loan to Mr. Mew, under the powers contained in the will; first, because it only authorized a loan to Mr. Wilkins and Mr. Mew jointly; and secondly, because that power involved a discretion, which was never exercised by the executors, for the trustees lent nothing, the money was taken by one of them (*Cull*), and, without being repaid to the estate, was retained by *Cull* and his partner *Mew* in their joint trade.

Fourthly. Time is no bar. Such transactions have been set aside after a greater lapse of time, *Wedderburn v. Wedderburn*; *Alfrey v. Alfrey* (b); and there being a trust, the Statute of Limitations is inapplicable, *Philipo v. Munnings* (c); *Playfair v. Cooper* (d).

Mr. Roupell and Mr. Wickens for Mr. Bloxam, the surviving executor. There is no ground for setting aside the release. The items of account are not impeached; the transaction was not settled until four months after the Plaintiff came of age, and there has been no suppression of any material fact. The money was lent in 1812 to Mr. Mew, under the power which authorized either a joint or several loan to the testator's son and son-in-law.

(a) 15 *Beav.* p. 392.(b) 10 *Beav.* 353.(c) 2 *Mylne & Craig*, 309.(d) 17 *Beav.* 187.



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son-in-law. The testator's business was necessarily carried on until *February*, 1812, in consequence of the option of pre-emption given to the testator's son and son-in-law, the money was then lent to Mr. *Mew* under the power, and security was given to the executors for the amount. The subsequent application is wholly immaterial. Having borrowed the money, he had an absolute dominion over it, and had a right to employ it in trade or in any other manner he pleased. The whole has been repaid, and after the acquiesced concurrence of the Plaintiff for so long a period, the transaction cannot be impeached.

As to the share of *Benjamin Thomas E. Mew*, the settlement expressly admits the account, and proceeds on the basis of its validity ; nothing is settled by it but the balance appearing on that account. The deed was voluntary, and it is not competent to the Plaintiff to impeach a settlement of accounts which the author of the settlement adopts, or to open transactions and raise equities which the settlor disclaims.

Mr. *Follett* and Mr. *Selwyn*, for the executors of Mr. *Mew*. This is an attempt, as against the estate of a person who was not a trustee, to raise a constructive trust upon transactions between the trustee and *cestuis que trust*, twenty-four years after they have been settled and closed. In cases of constructive trusts time does create a bar; *Beckford v. Wade* (a). That distinction is pointed out by Lord *Cottenham* in the case cited of *Wedderburn v. Wedderburn* (b). The Plaintiff and her husband had notice, at all events, from the time of her marriage in 1836, that the money was in her father's hands :

(a) 17 Ves. p. 97 ; and see *Portlock v. Gardner*, 1 Hare, 594.

(b) 4 Mylne & Craig, p. 53.

hands: the laches and lapse of time from that period alone is sufficient to bar her right; *Browne v. Cross* (a).

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Mew took the money as a loan, and if there be any liability, *Cull* is primarily chargeable, and his representatives are not parties to this suit; it would be impossible to take the partnership accounts of the business in their absence. To follow trust money into a business it must be clearly ear-marked; here the evidence is insufficient to prove that fact. They also referred to *Wilson v. Moore* (b).

Mr. Lloyd and Mr. Smythe, for Benjamin Thomas E. Mew, opposed the Plaintiffs. They cited *Bonney v. Ridgard* (c); *Townsend v. Townsend* (d); *Bell v. Bell* (e), to shew that a constructive trust may be barred by time, laches and acquiescence.

Mr. Snape and Mr. Taylor, for other parties. *Bridge v. Bridge* (f) was cited to shew that a volunteer under a voluntary settlement had no title to relief.

Mr. R. Palmer, in reply. The representatives of *Cull* are not necessary parties; for now when two persons are liable, either may be sued alone (g). The brother's settlement included all his rights, and if he chooses to disclaim the benefit of this suit, the advantage of it will accrue to the Plaintiff. The trust money being mixed in the business, it is not necessary to shew the precise amount of it, the Defendants must separate it.

(a) 14 Beav. 105, affirmed with costs by Lord St. Leonards, July 16, 1852.

(b) 1 Mylne & Keen, 126, 337.

(c) 1 Cox, 145.

(d) 1 Cox, 28.

(e) Lloyd & G. temp. Plunkett, 44.

(f) 16 Beav. 315.

(g) Ordines Can. 174.

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it. Lord *Chedworth v. Edwards* (a). The Plaintiff is entitled to the profits in the interim between the release and the marriage.

The MASTER of the ROLLS reserved judgment.

Dec. 11. *The MASTER of the ROLLS.*

The will empowered the executors to lend such parts of the trust money as they should think proper to *Robert Bird Wilkins* and *Benjamin Mew*, that is, either to the son or to the son-in-law; for I read this power in the disjunctive, as a direction to lend it to them, or to one or the other of them, and I am of opinion that, under this power, it would not have been a breach of trust if the executors had lent it to one and not to the other. According to the construction I put on this clause of the will, the executors had authority to lend any portion of the money to Mr. *Mew* upon his giving proper security. When Mr. *Mew* entered into partnership with *Cull*, he took upon himself the debt for which *Cull* alone was previously liable, and gave his promissory note to the executors for 3,279*l.*; the question is, what was the nature of that transaction. The executors had power and authority to lend the money to Mr. *Mew*, and in my opinion they exercised that authority by lending that sum of money to Mr. *Mew*. I treat it exactly in the same way as if Mr. *Cull* had, in fact, repaid the money on that day, and the executors had then paid it over to Mr. *Mew*, who had given a promissory note for the amount. Mr. *Mew* became a partner with *Cull*, and employed a considerable portion of

(a) 8 *Ves.* 46.

of the money which he got from the testator's estate in carrying on the partnership business; of that I have not the slightest doubt. But I am of opinion that he is not liable to account for the profits made in that business by reason of the money so advanced to him having been so employed.

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It has been contended, that the rule between principal and agent is applicable to this case, which holds, that if an agent employ his principal's money in his business, and it can be traced and distinguished, the principal is entitled to recover it, and the profits made by it. But that doctrine does not appear to me to apply in this case. The money, in my opinion, was not taken by Mr. Mew in his character of agent, nor was it so treated. But whether authorized to be so taken by him or not, in the first instance, the executors have sanctioned his taking it as a loan from the testator's estate; and I am of opinion they had authority so to do. It appears to me that I may consider the case exactly as if it were the case of a stranger. Now, if this money had been lent to a stranger, under an authority in the will, it would have constituted a debt from the stranger to the testator's estate, and if it became very profitable in the hands of the borrower, the Court would not hold, that because it was part of the testator's estate, the executors or any persons claiming under the will, were entitled to the profits made by the employment of that money. If the loan was authorized, it follows, that the person who received the money was entitled to do with the money exactly as he thought fit, and to employ it in any species of speculation, or in any other way he pleased. It became his money, and he became subject to the obligation of repaying the amount so borrowed. As I have already stated, I am of opinion, that the money obtained from the testator's estate was actually employed
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by him in the business of a brewer. He seems, subsequently to entering into the partnership, and for the purposes of it, to have taken money to the amount of 8,147*l.*, for which he gave a security by mortgage: but it appears that every penny of the money so taken has been repaid to the testator's estate. It is, undoubtedly, true, that no account has been given of the profits, but as I have already stated, neither the executors nor the *cestuis que trust* were entitled, in my opinion, to claim any part of the profits made in respect of the business so carried on, that is, so far as Mr. *Mew* is concerned.

With respect to Mr. *Cull* it might have been different, but no case is made against him, his executors are not before the Court, and probably the Court, after the great length of time that has elapsed, would not think that anything substantial could be made in respect of his employment of the 3,000*l.* for the two years it was in his hands, and during which interest has been paid. Mr. *Mew* was not a trustee originally constituted by the testator, and, in my opinion, the facts that have occurred have not constituted him a *quasi* trustee or made him liable to account in the character of a trustee. He held the character of a borrower from the testator's estate, who was, probably, allowed by the trustees to deal with the money in a very improper manner, with this this Court has now nothing to do, unless by that mode of dealing with the property a loss has been sustained by the estate or by the *cestuis que trust*. No loss has occurred, and it is not for the purpose of making good any loss, that this suit is instituted; but to enforce a claim of the *cestuis que trust* to recover the profits made by Mr. *Mew*, over and above the principal and interest of the money taken and employed by him.

That being the state of the case in *May*, 1829, wh
Mr

Mrs. Parker attained her age of twenty-one years. At that time certain accounts were submitted to her, all the items of which were correct, but they contained no statement that part of the testator's estate had been advanced to Mr. *Mew*, and that it had been employed by him in the brewery business. That is omitted from the accounts, but if I am right in the conclusion to which I have come upon the first part of the case, that omission was immaterial, because, in my opinion, the legatees were not entitled to claim any part of profits made in the business during that period.

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The release was executed by her in the month of September following. Now, undoubtedly, this Court will look with very considerable jealousy at a release executed by a young lady who has just come of age, or shortly after, by reason of the difficulty that a young lady would have, in understanding complicated accounts and her rights with respect to property, and her disinclination to contest the conduct of her trustees. In that case, the Court would expect that her natural guardian would be the person who would assist her in having those accounts investigated; and if the accounts were taken with the assistance of her natural guardian, that would be a strong argument in favour of the validity of such a release. The converse, undoubtedly, is the case where the guardian himself is the person to be benefited by the release; and it was urged, very strongly, that this was a case in which Mr. *Mew* was, in point of fact, benefited by the release, and that, therefore, no reliance could be placed upon it, and that this lady ought not to be bound by it. If, in point of fact, the father had obtained any substantial benefit by this release, I should not consider it of any value; but, in my opinion, the release does not assist the Plaintiff's case at all. Here is an account stated between the executors and the daughter, the

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items in the accounts, so far as they go, are correct; there is no evidence before me to impeach the correctness of any one of the accounts. There is omitted from the account that statement (which, as I have already observed, I consider immaterial), that part of the property of the testator had been lent to Mr. *Mew*, and had been employed by him in trade. This Court, after an account has been stated, signed and acted on for a considerable length of time, nay, even for a short length of time, will not open it, unless some error or inaccuracy is pointed out in it. But, in my opinion, no inaccuracy whatever is pointed out in that account.

The facts that occurred immediately after the release must have shewn the Plaintiff that the property of the testator had been lent to Mr. *Mew*, and had been employed by him in trade.

The money was not paid over to her, but was treated as a loan from her to her father; he gave her a promissory note for the amount, and regularly accounted to her for the interest down to her marriage in 1836.

At the time of the Plaintiff's marriage, the account was stated again between herself and her father, and Mr. *Parker*, her husband, was a party to it: he knew exactly what had taken place, and they allowed the money to remain in the trade of the father from that period down to the death of Mr. *Mew* in 1850. At the time of the marriage, no inquiry was made of the executors whether they had fully accounted, no further account was asked from them, and, as from the date of the marriage it would be impossible to contend (in fact, in reply, it was not considered possible for the Plaintiff to contend), that any account could be asked of the profits made of the 2,500*l.*, which Mr. *Mew* had been allowed to

to retain at interest, from the period of the marriage, down to Mr. *Mew's* death, in 1850. During this time matters went on upon the same footing, and the interest was duly paid by Mr. *Mew* to Mr. *Parker* on the 2,500*l.*

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In addition to this, Mr. *Mew*, during the whole period, appears to have been making presents and an allowance to Mr. and Mrs. *Parker*, and to have been advancing money to enable Mr. *Parker* to buy a situation in trade; and it is not till the death of Mr. *Mew*, fourteen years after the marriage and more than twenty-one years after the account was settled between his wife and the executors, that Mr. *Parker* (for that this is his suit no one can doubt) thinks fit to raise any questions whatever upon the subject. If he had raised the questions during the life of Mr. *Mew*, the probable consequences to himself might have been very serious. He might have lost those advantages which he derived from him, and Mr. *Mew* being perfectly well aware of the whole of the transactions, and of the nature of the case, would have been able, in the clearest and most satisfactory manner, to have stated exactly what had taken place: for it is clear, that he was a man of business and that his accounts were kept in a regular manner. A case which is brought forward after this lapse of time does not present itself in a favorable aspect. It is quite certain, that this Court will not allow any time to protect a fraud, or to bind persons by a transaction in which they have been prejudiced, if, in fact, they have used the best diligence they could in bringing the matter speedily before the Court. But, it appears to me, upon this case, having not merely attended very carefully to the very elaborate and able arguments of the Counsel and the detail of the facts before me, but also having taken the trouble to go through the evidence myself,

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that assuming this suit maintainable, there is nothing to justify the non-institution of it at a previous period. I am, however, of opinion, that it could not have been maintained, if it had been brought forward immediately after the marriage or immediately after the release executed by Mrs. *Parker*. So far, therefore, as Mrs. *Parker's* share is concerned, I am of opinion, that the case fails.

The other part of the case is in respect of Mr. *Benjamin Thomas E. Mew's* share, which by a voluntary settlement stands settled, in certain events, upon Mrs. *Parker* and her children. The same observation occurs with respect to this as with respect to the other share, with this additional observation, which is of great moment:—It is, that the account was settled between *Benjamin Thomas E. Mew* and the executors when he attained twenty-one years and when the deed was executed. In fact, there is a recital of it in the deed, and it appears to me, that he would be estopped from alleging the contrary; but so far from doing so, he abides by it, and insists upon its being correct. It would be a new doctrine to me, that where a person, upon a settlement of accounts between himself and his trustees, is found entitled to a specific sum of money, and he afterwards voluntarily settles that sum of money in favour of himself and certain other persons, those other persons, who are mere volunteers, can insist on his incurring the expense of a chancery suit, as they allege, for his own benefit, to set aside the settlement of accounts by which he professes to be bound and which he believes to be accurate. So that, he being of opinion that he could not set it aside, even if he were desirous, the Plaintiffs ask to be entitled to compel him to do that which he is unwilling to do, and to open accounts by which he is desirous to be bound.

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The result is, that, in my opinion, if this were the case of Mr. *Parker* himself before his bankruptcy, who came forward to institute this suit in respect of the unsettled property, it would completely fail ; that if it were the case of Mrs. *Parker* and her children, claiming in respect of the unsettled property and the right to a settlement, it also completely fails ; that if it were the case of the assignees suing in the place of Mr. *Parker*, it also fails. In my opinion, therefore, it fails altogether, and is a suit which ought never to have been brought before this Court.

The result is, that the bill must be dismissed with costs as against all persons, except Mr. *Parker* himself, and against his assignees, who, although they repudiated the suit, yet have never disclaimed any interest in the subject matter of it, or submitted to be bound by the accounts themselves.

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## HARFORD v. LLOYD.

The produce of a specific legacy misapplied by *A.*, an administrator, being traced into *post obit* securities given by *B.* to *C.*, the Court held that the *cestui que trust* was entitled to a charge on the securities.

A specific legacy of 6,000*l.* Consols, bequeathed to the Plaintiffs, was unnecessarily and improperly sold out by the administrator (*A.*), with the aid of *B.*, and the produce carried partly to the banking account of *A.*, and the re-

mainder to that of *B.* A series of shuffling of cheques and transfer of moneys took place, but 2,908*l.* was traced to *B.* About this time, *B.* laid out moneys in the purchase of a *post obit* security, and though the trust moneys could not be distinctly traced into the securities, yet the Court held, from the suspicious character of the transactions, that such was the just inference, so far as to throw on the other side the onus of disproving it, and this not having been done, the Court held, that the Plaintiffs had a charge on the securities for the 2,908*l.* and interest.

In addition to this, *B.* had sold and transferred the securities to *C.*, in consideration of a debt then owing. *C.* had notice that the money by which the securities had been obtained had been derived from *A.*, though she had no notice of the breach of trust. Held, that *C.* could not set up an adverse title as against *A.*, and *à fortiori*, that she could not do so as against the Plaintiffs (*A.*'s *cestui que trust*.)

**JOHN IVYLEAFE** bequeathed to the *Bristol* Royal Infirmary his money in the public or Government Stocks, upon trust, after certain payments, to apply the income towards the charitable purposes of the Infirmary for ever. And he appointed the treasurer, for the time being, of the Infirmary to be sole executor of his will.

The testator died on the 10th of *January*, 1850, possessed of a sum of 6,000*l.* Consols. At the time of his death, he was residing in lodgings in the house of *Evan Rees*. *Evan Rees* took possession of his papers, and communicated the contents of his will to the officers of the Infirmary, who, from the information derived from *Rees* and under a misconception of the true state of the testator's assets, renounced probate, and letters of administration were, on the 17th of *October*, 1850, granted to *Evan Rees*, as a creditor of the deceased. He obtained letters of administration through the instrumentality and assistance of *John Lloyd*, a money lender,

lender, who became surety for him to the Ecclesiastical Court.

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The state of the testator's assets was such, that the sum of 6,000*l.* Consols was a clear fund, applicable to the trusts of the will.

On the 22nd of *October*, 1850, *Rees* sold out the whole stock, and the produce was paid to him by the broker in three notes of 1,000*l.* each, three notes of 500*l.* each, and a cheque for 1,342*l.* Up to this time neither *Lloyd* nor *Rees* had any banking account, but, on the same day, *Lloyd* went with *Rees* to Messrs. *Davies & Co.*, bankers, and *Lloyd* opened an account with them by paying in the identical cheque for 1,342*l.* On the following day *Lloyd's* wife, who had a banking account with Messrs. *Coutts & Co.*, introduced *Rees* to them, and he then opened an account with them with the notes produced from the sale of the stock. These three accounts being opened, a long series of cheques were drawn on them, and the produce, apparently, transferred from one account to another, but there appeared such a shuffling of the money, that it was impossible clearly to trace it. But, in addition to the cheque of 1,342*l.*, *Lloyd* had, beyond doubt, received other parts of the trust money from *Rees*, by means of cheques drawn on his banking accounts. It was also taken to be the fact, that the aggregate of the balances of the three banking accounts did not, at any time, exceed the produce of the 6,000*l.* Consols.

The officers of the Infirmary having afterwards, to some extent, discovered the state of affairs, filed a bill, on the 15th of *February*, 1851, against *Rees* and *Lloyd*,  
to

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to recover the trust money, the produce of the specific legacy to the charity. By the decree, made on the 25th of *January*, 1853, *Lloyd* was ordered to pay into Court the amount of the cheque for 1,342l. 10s., and an account was directed of the part of the produce of 6,000l. Consols which *Lloyd* had received. *Rees* was ordered to pay into Court 2,666l., which he admitted having paid to *Lloyd*, and to account as administrator.

*Lloyd*, thereupon, took the benefit of the Insolvent Debtors Act and *Rees* went to *Australia*, so that the suit was fruitless.

The officers of the Infirmary afterwards discovered the following circumstances relating to the produce of the Consols and its application. In 1850, Mr. *George Howard*, who was presumptively entitled to a title and to large estates, on certain contingencies to which it is unnecessary to refer, was confined as a prisoner for debt in the Queen's Bench Prison, *Lloyd* being his principal detaining creditor. In *September*, 1850, *Lloyd* entered into a negotiation, and in *November*, 1850, into a written agreement, with *Howard*, to pay and compromise his debts, so as to procure his discharge from prison, upon receiving a *post obit* security for a large amount. *Lloyd* accordingly paid and compromised the debts to the extent as was stated in the deeds of 6,410l., and Mr. *Howard* and his brother gave to *Lloyd* *post obit* securities, dated the 11th of *February*, 1851, for securing a contingent sum of 25,000l.; these securities consisted of a bond, a warrant of attorney, and a mortgage. The Plaintiffs alleged, that the consideration for these securities had, to a great extent, been paid out of the produce of the 6,000l. Consols.

Pend

Pending the suit of *Harford v. Lloyd*, an indenture was executed, dated the 2nd of *May*, 1851, between *Lloyd*, of the first part, his wife (who was possessed of a large separate estate) of the second part, and a trustee for her, of the third part. After reciting that Mrs. *Lloyd* had, since her marriage in 1844, lent her husband sums amounting to 13,000*l.* out of her separate estate, and that the greater part of the moneys advanced to *Howard* was her separate estate, and that *Lloyd* had agreed to sell her *Howard's* security for 6,410*l.*, Mr. *Lloyd*, in consideration of that sum, conveyed the securities to the trustee for the separate use of his wife.

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The present bill was filed by the Infirmary against *Lloyd*, his wife, who had since died, her trustee, and *Rees*, who was out of the jurisdiction, seeking to follow the produce of the Consols into the *post obit* securities. It prayed a declaration, that the deed of *May*, 1851, was void, and that the Plaintiffs might have the benefit of the *post obit* securities.

It was alleged, on the part of the principal Defendant, that part of the funds provided for effecting the arrangement with *Howard* had been derived by Mr. *Lloyd* from his daughter, Miss *Lloyd*, and from his wife out of her separate estate. With respect to Miss *Lloyd*, the Court, however, came to the conclusion, that although very considerable sums had been lent by her to her father, yet that they were, with the exception of two, all advanced prior to *June*, 1850, and that no part of these advances had been applied as alleged. As to these two excepted sums, it appeared, that on the 25th of *January*, 1851, she had sold out a sum of stock and paid the produce, 385*l.*, to her father, who gave a security

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curity for it, and on the 25th of *January*, 1851, there was a credit in Mr. *Lloyd's* banking book of 250*l.*, which might be a portion of the 385*l.* Again on the 4th of *February*, 1851, she sold out another sum and lent the produce, 240*l.*, to her father, who gave a security for it, and there was a corresponding credit in Mr. *Lloyd's* banking book.

As to the large advances made by Mrs. *Lloyd* to her husband, the Court came to the conclusion that no part could be traced into the *post obit* securities.

Mr. *Follett* and Mr. *Toller*, for the Plaintiff, argued, that although there had been a shuffling of the trust money, still that it had been clearly traced into the *post obit* securities, and that, therefore, the Plaintiffs had a charge on them; *Pennell v. Deffell* (a).

That the trust moneys being traced into the securities and mixed up with other moneys, the onus of proving what part did not belong to the trust was thrown on the Defendants; *Lupton v. White* (b); Lord *Chedworth v. Edwards* (c).

That the moneys of Mrs. and Miss *Lloyd* had not been advanced for the purchase of the securities, and that Mrs. *Lloyd* had notice of the source from which these moneys had been derived.

Mr. *Selwyn* and Mr. *Cairns*, for Mrs. *Lloyd*, argued,  
 that

(a) 4 De G. M. & G. 372.

(b) 15 Vet. 432.

(c) 3 Ves. 46; and see *Gray*

*v. Haig*, and the cases there cited, *ante*, p. 219.

that the trust money had not been traced into the securities; that it had been mixed with the general moneys of *Rees* and *Lloyd*, and could not be followed; that the assignment to Mrs. *Lloyd* was perfectly valid as against the Plaintiffs; that the assignees of *Lloyd* could alone challenge its validity, and that Mrs. *Lloyd* was a purchaser for valuable consideration without notice; *Kennedy v. Green* (a), and *In re Moylan* (b), were cited.

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**Mr. R. Palmer** and **Mr. Osborne**, for Sir **J. Harbfield**, the Assignee of Mr. *Lloyd*.

**Mr. Lindley**, for the trustee of Mrs. *Lloyd*.

*The MASTER of the ROLLS.*

**This** is a case of great peculiarity. The state of it is **this**:—[*His Honor here recapitulated the principal facts above referred to, and proceeded:—*]

**I** shall consider the case, in the first place, as against Mr. *Lloyd*, and afterwards consider it separately as against Mrs. *Rebecca Lloyd*. As to Mr. *Lloyd*, the facts of the case shew very clearly, that he distinctly knew that this money was the produce of the 6,000*l.* Consols, and that *Rees* had obtained possession of it in his character of the legal personal representative of Mr. *Loylase*. They also shew, that Mr. *Lloyd* had notice of the contents of the will, which gave the whole of this property for the benefit of a charity.

**The first question is, whether these trust funds can be traced**

(a) 3 *Myl. & K.* 699.

(b) 16 *Beav.* 220.

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traced into these securities, and various steps must be established for that purpose. The Consols were sold out by a broker employed at the suggestion of Mr. *Lloyd*, the produce was paid to Mr. *Rees*, and it is then distinctly traced to the two bankers. Up to this moment, neither *Rees* nor *Lloyd* had any account with any bankers, and (except from *Lloyd's* wife and daughter) they had, apparently, no means of obtaining the means of opening any. The cheques, drawn by *Rees* against his account at Messrs. *Coutts*, amounting, in the whole, to 3,788*l.*, are proved to have been paid to *Lloyd*. *Lloyd* gives to *Rees* four I. O. U.s, amounting altogether to the sum of 2,875*l.*, by which he admits that sum to be due to him from *Rees*. I therefore consider it established, that the amount of this money was paid by *Rees* to *Lloyd*. I consider it also to be established, that *Rees* had no money arising from any source whatever, except the money derived from *Ivyleafe's* estate, and that *Lloyd* was well aware of that fact, and that this money which was paid to him came from *Ivyleafe's* estate.

The next question is, what was done with this money ? These cheques were paid at various times between *October*, 1850, and the 12th of *February*, 1851, and it was during this period that *Lloyd* entered into the arrangement with Mr. *Howard*. The first suggestion as to obtaining the release of Mr. *Howard* from prison, by means of moneys advanced to him upon *post obit* securities, took place in the beginning of the month of *September*, 1850, and a written agreement was actually entered into on the 13th of *November*, 1850. In that year, various sums of money were paid for Mr. *Howard*, and the matter was completed and the mortgage given on the 11th of *February*, 1851. It is obvious, that this arrangement could not have been carried into effect by  
 Mr.

Mr. *Lloyd*, except by procuring a considerable sum of money, to enable him to advance the funds necessary for this purpose. And with respect to the money so advanced, I have this established :—There is a series of cheques, proved to have been drawn by *Lloyd* upon his account with Messrs. *Davies & Co.*, which passed through the hands of Mr. *Howard*, and which amounted to the sum of 2,806*l.* There are also other cheques, amounting to 143*l.*, which have the endorsement of the solicitor of Mr. *Howard*, another cheque for 102*l.*, which is stated to be expressly drawn for the purpose of paying the balance of consideration for the *post obit* securities, and was drawn on the 11th of *February*, 1851, the day of the completion of that transaction. I am of opinion, therefore, that the 2,806*l.* and 102*l.*, which together would amount to 2,908*l.*, (omitting all the other cheques), were paid by Mr. *Lloyd* for the purpose of these *post obit* securities.

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The next question is, whether it is established by the evidence, that the sums were paid out of the monies which *Rees* supplied to *Lloyd*. I have this fact before me, that although all the cheques on the credit side of this account of *Lloyd* with *Davies & Co.*, are not proved to have come from *Rees*, yet a very large proportion of them did expressly come from him, and that *Lloyd* had no account with any banker previous to the time of *Rees* advancing this money to him. There is a great deal of intermixture, backwards and forwards, of cheques, which renders the tracing of them extremely difficult. This, I assume, to be the effect of accidental circumstances in the dealings between the parties, and not done for the purpose of concealment or fraud, and these, in the absence of the parties themselves, it is impossible to trace, and possibly they themselves would be unable to explain



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explain them. But, what is very material is this:—It appears that at no time did the united balances on these three accounts exceed the amount which *Rees* obtained from *Ivyleafe's* estate. This appears to me to throw on Mr. *Lloyd* the burden of proving that these moneys did not come from *Rees* and from *Ivyleafe's* estate, for it is, in my opinion, proved, that *Lloyd* knew that everything that he received from *Rees* was derived from *Ivyleafe's* estate.

Then has Mr. *Lloyd* proved that it came from any other source? There is a vast amount of allegation, that a great number of sums were due to him, and that moneys were obtained by him from other sources, to be applied to his general purposes, but, with the exception of the moneys derived from Mrs. *Lloyd* and Miss *Lloyd*, the matter stands totally on allegation. With that exception, there is not a tittle of proof and not a shadow of evidence to shew, that any money came from any other source whatever.

With respect to Miss *Lloyd's* evidence, I think that may be disposed of very shortly. It is clearly proved, that considerable sums of stock were sold out by her, or by a broker for her, and advanced to her father, and that upon all these occasions I. O. U.s corresponding to those sums, were given to her, either by her father, or by her step-mother and her father, to secure those amounts; but, with the exception of two sums, they were all advanced prior to the 6th of *June*, 1850, and consequently prior to any question relating to this particular transaction, and none of them appear to have been paid into the account of Messrs. *Davies & Co.*, which was opened for the first time on the 22nd of *October*, 1850. Two sums were sold out by her, the 400*l.* stock  
 was

was sold on the 25th of *January*, 1851, and produced 385*l.*, and the 250*l.* stock was sold out on the 4th of *February*, and produced 240*l.* Miss *Lloyd* states in her evidence, that those amounts of stock were sold out and paid to her father, expressly for the purpose of being applied for the purchase of this bond; but the evidence shews, that the money was advanced to Mr. *Lloyd* on another security given by him to his daughter in the same months of *January* and *February*, and for another purpose, although it is undoubtedly possible that some portion of the funds may have been applied for the benefit of Mr. *Howard*.

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I am of opinion that the whole transaction was founded on this:—that Mr. *Lloyd* was enabled to enter into the transaction, and that he did, in fact, enter into it, by means of the funds supplied to him by *Rees* for the purpose; that he knew they were trust funds; and that without them he never would have been enabled to enter into this transaction: the trust funds were the cause and origin of the transaction, and were knowingly applied by Mr. *Lloyd* for the purpose of it.

With respect to Mrs. *Rebecca Lloyd*, there is not a shadow of evidence to prove that any money was advanced by her at the time the transactions with Mr. *Howard* took place. The evidence to the contrary is very strong. It is, I think, established, that she had advanced moneys to a considerable amount to her husband, but they were all prior to this period.

Finding, therefore, no moneys whatever derived from any other source than the trust funds, with the exception of the two sums of money derived from the daughter, for which sufficient security was given, I am  
of


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of opinion that it is established, that these trust funds were applied in the payments to Mr. *Howard*, in consideration of which he gave these *post obit* securities. The probabilities of the case appear to me to be very strong, in favour of believing that *Rees* advanced this money in the belief that he was to have a share in the transaction, and I look in vain for any reasonable cause to induce him to advance so large a sum of money as he did to Mr. *Lloyd* without security, unless he expected to derive some benefit or advantage from it. The result is, that as against Mr. *Lloyd*, I am of opinion the case is established, that Mr. *Rees* supplied him with money for the purpose of obtaining these securities, that he did employ the money for that purpose, and that being a trust fund, it may be traced into the securities, which may be made available to pay what is due to the Plaintiffs, who are entitled to the trust money.

I will, in the next place, consider the case as against Mrs. *Rebecca Lloyd*. That a great fraud was committed by *Rees* and *Lloyd*, with a view to dispose of this money, which belonged to the *Bristol* Infirmary, between themselves, appears to me to be proved, but it is not proved that Mrs. *Lloyd* exactly knew what the funds were which they were dealing with. This, however, appears to me to be quite established, that she knew that all this money was derived from *Rees*; and after the most careful consideration, I am of opinion that the assignment made to her was nothing more than a colorable transaction, entered into with a view to defeat *Rees's* debt. That the 13,000*l.* was due from Mr. *Lloyd* to Mrs. *Rebecca Lloyd* I do not doubt, but as to any money being advanced at the time of the assignment to her, not only is that fact not proved, but, I think, the opposite is established. I put the case no higher than

this :—that Mrs. *Rebecca Lloyd* knew that Mr. *Rees's* money had been applied in purchasing the securities, and that she allowed herself to be an instrument in the hands of her husband to defeat that claim. In my opinion, she could not defeat *Rees's* claim, and if, in that state of circumstances, *Rees* would be entitled to the securities as against Mrs. *Lloyd*, then the Plaintiffs, in my opinion, are entitled, in a still higher degree than *Rees*, to claim in priority of Mrs. *Lloyd*, so much of these moneys as were advanced on these securities. This being so, the Plaintiffs, in my opinion, are entitled to the first charge on these securities.

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I may observe, that the comments made by both sides on *Pennell v. Deffell* (a) and *Devaynes v. Noble* (b), do not appear to me to be applicable. In *Pennell v. Deffell*, I thought that where moneys had been paid into a general account with bankers, and cheques had been drawn indiscriminately upon it, they became so mixed up, that the trust fund could not be distinguished from the other moneys paid in. The Lords Justices differed from me in that opinion, and thought that by the attribution of payments it might be distinguished. But, in my opinion, this case is much higher than that. Here, in my opinion, the securities were created by the trust fund, and I have no evidence before me that anything else was added to it, with the exception, that there some presumptive evidence that two sums, at the end of the transaction, were added by Miss *Mary Lloyd*, but the whole transaction originated in the trust fund, was carried on by the trust fund, and completed by the trust fund, with the exception that those two sums might have been partly applied for that purpose, but if they were they formed a very small portion of it.

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(a) 4 *De Ges*, M. & G. 372.

(b) 1 *Mer*. 530.

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The result is, that I am of opinion, in this case, that the trust funds are traced, and that the Plaintiffs are entitled to a declaration to that effect, and a decree accordingly.

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DECLARE that the Plaintiffs have a charge on the *post obit* securities for 2,875*l.* and interest at 4 per cent., and make the ordinary redemption decree.

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#### STEWART v. STEWART.

March 8.

A Plaintiff described himself as resident within the jurisdiction. By amendment he described himself as of the ship *W.*, "now on a voyage to *Sydney* and back to *London*, master mariner." It not appearing when he would return within the jurisdiction, security for costs was ordered to be given.

THE Plaintiff, by his original bill, described himself as "of *Ellington Terrace, Liverpool Road*, in the county of *Middlesex*, Master Mariner." The Defendant appeared and answered. After this the Plaintiff amended his bill, and described himself as "of the Ship *Wacousta*, now on a voyage to *Sydney* and back to *London*, Master Mariner."

The Defendant, *Elizabeth Jane Stewart*, before appearing to the amended bill, moved that the Plaintiff might give security for costs.

Mr. *Loudon*, in support of the motion. The Plaintiff having described himself as being out of the jurisdiction is bound to give security for costs.

Mr. *Rogers, contra*. The rule does not apply to a master mariner, whose business requires him, from time to time, to absent himself temporarily from *England*. Secondly, the rule does not apply unless the Plaintiff is domiciled abroad; and, thirdly, the Defendant comes too late, for she was made aware of the fact on the 9th  
 of

of January, and has delayed making the application.  
He cited *Hoby v. Hitchcock* (a); *Blakeney v. Dufaur* (b); *Conway v. Wilson* (c).

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*The MASTER of the ROLLS.*

I understand the rule to be this:—that this Court, in all cases of this kind, sees whether there is reasonable security that any order it may make against the Plaintiff can be enforced, and does not compel a Plaintiff to give security for costs, merely because he goes abroad pending the suit, for he may have no intention of remaining there.

In this case I find that the Plaintiff has no fixed abode in this country, that he has gone abroad out of the jurisdiction, and that there is nothing to shew when he will return.

The order must be made.

(a) 5 Ves. 699. (c) *Irish Jurist*, 66.  
(b) 2 De G. M. & G. 771.

NOTES.—See *Kerr v. Gillespie*, 7 Beav. 269; *Wyllie v. Ellice*, 11 Beav. 99.

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19, 20.

## SINCLAIR v. WILSON.

A trustee, with the consent of his *cestui que trust*, pledged *Madras*

government notes, held by him in trust, for the benefit of a firm of which he was partner. The notes were afterwards redeemed and delivered to the firm. Subsequently the firm, without the consent of the *cestui que trust*, pledged them for a similar purpose. The firm being insolvent and bankruptcy imminent, the trustee redeemed the notes with partnership assets, indorsed them to himself personally, and replaced them in his private chest. The firm became bankrupt.

Held, first, that the notes were not in the order and disposition of the firm; and,

secondly, that there was no fraudulent preference.

BY a settlement, made in 1836, upon the marriage of *Joseph Barrow*, a merchant in *Madras*, and the Plaintiff, *Matilda Charlotte Sinclair*, 50,000 sicca rupees, secured to trustees by the bond of Mr. *Barrow*, were settled upon trust for the Plaintiff for life, with remainder to Mr. *Barrow* for life; and after their decease, in the event of there being no children, (which happened,) upon trusts for Mr. *Barrow*.

The trust moneys might, amongst other securities, be invested on "government loans in *India*."

In 1842, Mr. *Barrow* died, and his wife was left executrix and sole residuary legatee. At this time, Mr. *Wilson*, a person residing at *Madras*, and Mr. *Marriott*, who was resident in *England*, were the trustees of the settlement, and the bond remained unpaid. Part of the assets of Mr. *Barrow* being realized, was handed over to Mr. *Wilson*, the trustee, in discharge of the bond, and was by him, in *June*, 1843, invested in the purchase of *Madras* government notes, which, with a subsequent similar purchase, amounted to 26,700 sicca rupees, and notice of the purchase was given to the Plaintiff.

On the 4th of *January*, 1845, *Wilson*, acting on behalf of himself and his co-partners in business (trading under the firm of *Barrow & Co.*), requested the Plaintiff to accommodate

accommodate the firm with the loan of these notes for a short time, in order to deposit them with the "Bank of *Madras*," for a limited period, as security for advances then required by them. The Plaintiff consented, and *Wilson* indorsed the notes to the firm of *Barrow & Co.*, and the firm, on the same day, deposited them with the Bank.

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In *March*, 1846, the Plaintiff left *India* and never returned; in *July*, 1848, she married Mr. *Sinclair*, and she was paid interest on the notes down to *December*, 1848.

In 1846, the firm of *Barrow & Co.* having paid off the moneys due to the Bank of *Madras*, the latter, without the knowledge or consent of the Plaintiff, returned the notes for the 26,700 sicca rupees to Messrs. *Barrow & Co.* The notes were then kept by *Wilson*, apart from the counting-house of the firm, in an iron chest appropriated to the safe keeping of papers relating to the Plaintiff's private affairs.

Afterwards, in *June*, 1846, *Wilson*, without the Plaintiff's knowledge or consent, deposited the notes for the 26,700 sicca rupees with the *Oriental Bank of Madras*, as a security for monies advanced to the firm.

In *February*, 1849, *Wilson*, knowing the firm was insolvent and that bankruptcy or insolvency was imminent, applied the partnership funds in redeeming the 26,700 sicca rupees from the *Oriental Bank*. The bills being returned to him, he, in the name of the firm, indorsed them to himself, as trustee for the Plaintiff under the settlement, and replaced them in the iron chest. Subsequently,



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Subsequently, in the same month of *February*, *Wilson* indorsed the notes specially and delivered them to *Mr. Dymes*, as his agent, with power to receive the interest, but not to part with or negotiate the notes themselves, and he sent a statement to that effect to the *Madras* Treasury.

On the 14th of *March*, 1849, *Wilson* left the *East Indies*, and arrived in *England* on the 23rd of *April*.

On the 8th of *May*, 1849, an act of bankruptcy was committed by the firm, upon which they were duly declared bankrupts.

The notes were claimed by the assignees on the one hand, as within the order and disposition of the bankrupts, and, on the other, by the Plaintiff, as property subject to the trusts of the settlement. The Chief Clerk found in favour of the Plaintiff, and the Assignees now moved to vary the certificate.

*Mr. R. Palmer* and *Mr. Karslake*, for the Assignees. The first question is, whether the notes were in the order and disposition of *Barrow & Co.* at the time of the bankruptcy. The Plaintiff, as executrix of her husband's will, had full power to deal with the property. She permitted the firm to transfer the notes to themselves, and to be applied for their benefit, and she was content to hold the firm accountable to her for the amount of them. That transaction therefore terminated the trusts of the settlement and converted the relation of trustee and *cestui que trust* into that of debtor and creditor; consequently this property was in the reputed ownership of the firm, and passed to the assignees;  
*Fox*

*Fox v. Fisher* (a); *Ex parte Thomas* (b); *Ex parte Atkins* (c).

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Secondly, if these notes did not pass to the assignees as being within the order and disposition of the bankrupts, but continued trust property belonging to the Plaintiff, then the voluntary employment of the funds of the firm, while it was in a state of insolvency and when bankruptcy was imminent, in redeeming them, constituted a fraudulent preference, and consequently the produce of the notes is liable to make good or restore to the bankrupt's estate the sums so improperly applied in their redemption; *Marshall v. Lamb* (d); *Poland v. Glyn* (e).

Mr. Kinglake, for the Plaintiff, contended that the property was ear-marked and lent to the firm for a particular purpose only, which had been completely satisfied; that having been restored to its former custody, it remained subject to the trusts of the settlement; that the pledging of it again by the firm, (every member of which knew of the trust,) without the Plaintiff's consent, did not affect its character and was a breach of trust, and that consequently the relation of debtor was not created, and that the notes were not in the order and disposition of the bankrupt; *Ex parte Marrable* (f); *Pinkett v. Wright* (g). That the employment of the money of the firm in setting right the breach of trust and in restoring the property was not a fraudulent preference, and that the Plaintiff was, therefore, entitled to the notes,

(a) 3 *Barn. & Ald.* 135.  
(b) 3 *M. D. & De G.* 40; 1 *Phill.* 159, reversing 2 *M. D. & De G.* 294.  
(c) 2 *M. & Ayer.* 348, reversing 1 *M. & Ayer.* 689; 4 *Dea. &*

*Ch.* 87.  
(d) 5 *Q. B.* 115.  
(e) 4 *Bing.* 22, n.; 2 *Dowl. & R.* 310.  
(f) 1 *Gl. & J.* 402.  
(g) 2 *Hare,* 120.

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notes, without restoring the money applied in redeeming them; *Ogden v. Stone* (a); *Morgan v. Brundrett* (b).

Mr. Cairns, for another Defendant.

Mr. Cailliard, for Mr. Sinclair.

Mr. Karslake, in reply.

March 20.

*The MASTER of the ROLLS.*

In this case, I have, after some considerable hesitation, come to the conclusion that the chief clerk has arrived at a right decision.

The particulars of the case are these:—Certain government notes were in the hands of Mr. Wilson, as trustee of the Plaintiff's settlement. Under the trusts of that settlement and the will of her husband, and subject to the payment of his debts and legacies, it was the Plaintiff's own property, and she undoubtedly might have disposed of it exactly as she thought fit; nevertheless it was trust property in the hands of Mr. Wilson, a member of the firm of Barrow & Co. The firm applied to the Plaintiff for leave to pledge this property, for the purpose of raising some money for the benefit of the firm. She consented, and thereupon Mr. Wilson indorsed the government notes over to the firm of Barrow & Co., who indorsed them over to the Madras Bank, to secure a sum of money lent to the firm. The Plaintiff was informed of that fact, and had no right or reason to complain of that transaction. The Madras Bank, being paid,

(a) 11 Mees. & W. 494.

(b) 5 Barn. & Ad. 289; 2 Nev. & M. 280.

paid, indorsed these notes back again to *Barrow & Co.*, but it does not appear that the Plaintiff had any knowledge of that transaction. The notes were then retained as the separate property of the Plaintiff, and were, in fact, set apart in a chest, and were never entered in the books of the firm as part of the assets of the firm. They afterwards deposited these notes, without indorsement, with the *Oriental Bank*, to secure the sum of 18,000 sicca rupees; but the Plaintiff was not informed of this transaction. Mr. *Wilson*, who seems to have been the only partner then remaining in India, knew of this transaction. He was informed by letter of the impending ruin of the firm; in fact, in the course of a fortnight after, he called together the creditors of the firm, and therefore that the act he did with reference to these notes was done in contemplation of bankruptcy cannot certainly be denied, in this sense of the term:—that he knew the insolvency of the firm was imminent, and certain. Mr. *Wilson* thereupon, and immediately, or shortly after receiving the letter giving this information, applied part of the assets of the firm then in his possession (consisting partly of the produce of consignments), in redeeming these notes, and he obtained them back again. The question, in that state of circumstances, is, whether this is property in the order and disposition of the firm, of which the firm were the reputed owners.

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I am of opinion, in the first place, that a trust was attached to this property, and that the firm were all perfectly aware of that fact, and that the property was the separate and distinct property of the Plaintiff. In the case of *Ex parte Marrable (a)*, the bankrupt, a wine merchant, had sold a pipe of wine to the Petitioner, and had

(a) 1 *Glyn & J.* 402.

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had been paid for it; at the bankruptcy, it had not been taken away from the bankrupt's cellar, but had been set apart, and each bottle sealed with the customer's seal. It was held that it did not pass to the assignees, as being in the order and disposition of the bankrupt.

Here this was property separated and set apart as belonging to the Plaintiff, and the more strongly so from this circumstance:—that one of the partners of the firm was the trustee of the property; it never was part of the assets of the firm, and it was lent to the firm for a specific purpose, which had been completed and at an end. I look at the case in this way:—suppose there had been no bankruptcy, but by some accident the notes had become worthless, as if they had been the notes of a company which had become bankrupt, upon whom would the loss have fallen? would it have fallen upon *Barrow & Co.* (which would have been the case if the notes were part of their general assets, and they had been liable for the amount to Mrs. *Sinclair*), or would it have fallen upon Mrs. *Sinclair*. I am of opinion that the loss would have fallen upon her. When the purpose for which the notes had been lent to the firm was completed, they had no authority to pledge them a second time to the *Oriental Bank*, and it was a breach of duty to do so. I am therefore of opinion, that these notes were trust property, and that the clause in the statute respecting order and disposition does not apply to them.

With respect to the second point of the case, I have some little difficulty in understanding how it applies. It has been contended, that assuming the bills to have been trust property, there was a fraudulent preference. But I think that if they were trust property, the principle

**ciple** does not apply, because a fraudulent preference **must** be made in favour of a creditor ; and if I am right **in the** view I take of the case, the Plaintiff was not a **creditor** of the firm, but was the owner of certain specific **property** in the possession of the firm, who had notice **of the** trust.

**I** have great doubt whether there was any intention to **benefit** Mrs. *Sinclair* by the redemption of the notes, **for all** the subsequent dealings with these notes appear **to me** to shew, that Mr. *Wilson* redeemed the notes for **the purpose** of trying to make them available for the **benefit** of himself or the firm, and to endeavour thereby **to retrieve** their affairs ; for he actually indorsed them **over** to a gentleman in *India*, and under circumstances **of pressure**, he did the same again in this country. A **desire**, therefore, on the part of the firm to benefit Mrs. *Sinclair* does not appear to me to be the leading motive **for this** transaction.

**I** am, on the whole, of opinion that this was the **property** of Mrs. *Sinclair*, and was not in the order **and disposition** of the bankrupts. She is therefore **entitled** to it. I do not think it proper to give any costs.

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DOCKS.

March 27, 28.

April 23.

Mortgagees of the tolls of the Birkenhead Docks held to have a priority over judgment creditors of the concern.

In a suit by mortgagees of a dock against the trustees and a judgment creditor, the chairman was appointed receiver of the tolls, with direction to pay into Court the balance, after paying the expenses of carrying on the concern and the interest on the mortgages. A judgment creditor having afterwards proceeded to attach the tolls under "The Common Law Procedure Act," was restrained by injunction.

BY the "7 & 8 Vict. c. lxxix, Commissioners were appointed for the purpose of making the *Birkenhead Docks, &c.*" They were empowered to enter into contracts for the execution of any works and for furnishing materials (a), but were not to be personally liable upon such contracts (b). Execution upon every judgment against them was to be "executed against the goods and chattels belonging to the Commissioners by virtue of their office." The Commissioners were empowered to borrow, on the credit of the tolls and of any property vested in them by virtue of the act, to a limited extent, and to assign the tolls and property as a security; but the mortgagees were to have no preference, in respect of the priority of their advances (c). The money borrowed was to be applied by the Commissioners, first, in paying the costs of obtaining the act, and next, in paying the expenses of constructing the docks, &c. (d). The 227th section provided, that all the tolls and the rents and the produce of the sale of lands should be applied in defraying the expenses of keeping in repair and improving and maintaining the dock, &c., and of paying the officers and servants, and of otherwise carrying

(a) Sect. 17. (b) Sect. 21. (c) Sect. 40. (d) Sect. 49.

It was insisted, that the possession of the receiver was either that of the dock company or of the mortgagees, and that in the former case the judgment creditor ought not to be restrained in the exercise of his legal remedies against the company, and in the second, that the mortgagees had no power, under the acts of parliament, to carry on the concern, but this argument was held unavailing.

The Court will not permit its Receiver to be interfered with or dispossessed of the property, nor will it allow payment to him to be intercepted, although the order appointing him was perfectly erroneous. An application must first be made to the Court for

ing the act into execution, and for paying the interest and repaying the principal of any sum of money borrowed by the Commissioners under the Act.

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By the 8th *Vict.* c. iv, additional powers to borrow were given, but the then subsisting mortgages were to have priority. The 8 & 9 *Vict.* c. lx, incorporated the subscribers by the name of "The *Birkenhead Dock Company*," and enacted, that "The Companies' Clauses Consolidation Act, 1845," and "The Lands Clauses Consolidation Act," should be incorporated in and form part of it.


By the 11 & 12 *Vict.* c. cxliv, s. 2, the duties and authorities of the Commissioners were determined, and in lieu of them (a), thirteen persons therein named were appointed and incorporated by the name of "The Trustees of the *Birkenhead Docks*." Six of them on behalf of the bondholders or mortgagees, four of *Birkenhead*, and three of *Wallasey* (b), and they were to have the powers vested in the Commissioners by the former acts.

Prior to the year 1851, very considerable sums of money had been raised under the powers contained in the acts, which were secured by mortgages or bonds, given in the form prescribed by the act, whereby the tolls were assigned, *tenendum* until the principal sums and interest had been repaid. The Plaintiff *Ames*, and the other four Co-Plaintiffs, were holders of some of those mortgages or bonds, the interest on which was greatly in arrear. *Abernethy*, a simple contract creditor, having obtained a judgment against the trustees, had proceeded to make it available by *fieri facias*, attachment,

(a) Sect. 3.

(b) Sect. 4.



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ment, and by other proceedings in equity. The Plaintiffs instituted this suit on the 29th of *May*, 1854, on behalf of themselves and the other mortgagees or bondholders, against the trustees of the docks and *Abernethy*, insisting that their rights and remedies were prior, in equity, to those of *Abernethy* as a judgment creditor of the trustees, and praying, first, an injunction to restrain the proceedings of *Abernethy*; second, an account; third, a declaration of the Plaintiffs' rights; fourth, a Receiver of the tolls; fifth, the realization of the Plaintiffs' security; and sixth, further relief.

On the 8th of *February*, 1855, an order was made in the suit, appointing Mr. *Powles*, the chairman of the trustees (sect. 33), to be the Receiver of the rates and tolls and of the rents of the property of the corporation, without salary and without giving security. It directed him to pay into Court half-yearly such balances, if any, as might remain in his hands, after payment of the expenses of carrying on the business and the interest then due and to become due on the mortgages. And the Receiver was not to account otherwise, until the further order of the Court.

It is now necessary to refer to the case of the Petitioner, Mr. *Williams*, who was no party to the suit, but was alleged to have interfered with the Receiver appointed under this order.

In 1851, the Petitioner *Williams* sold some mud barges to the trustees, for the purpose of the works, and became a creditor for 600*l*. On the 26th of *January*, 1855, he obtained a judgment against the trustees for that amount. On the 2nd of *February* he obtained an order *nisi*, under "The Common Law Procedure Act, 1854," (17 *A. & E. R.* 125, s. 61), calling upon fifteen  
 masters

masters of ships in the docks to shew cause, why he should not be allowed to attach the tolls due from them to the trustees, in satisfaction of his judgment. This order was served on five of the garnishees on the 3rd, 4th and 5th of *February*.

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On the 16th of *February*, an order absolute for the payment to the Petitioner of the tolls was made on three of the garnishees, and execution was to issue without further order.

The Plaintiffs gave notice of motion to commit the Petitioner for contempt, by interference with the Receiver, and also for an injunction to restrain further proceedings upon the judgment. The Petitioner, on the other hand, presented his petition for leave to issue execution and to obtain satisfaction of his judgment debt out of the tolls attached. The motion and petition now came together on to be heard.

The arguments on both sides are so fully stated in the judgment, that it is unnecessary to repeat them.

Mr. *Follett* and Mr. *Goldsmid*, for the Plaintiffs, in support of the motion and against the petition, cited *Potts v. The Warwick and Birmingham Canal Navigation Company* (a); *Russell v. The East Anglian Railway Company* (b); *Whitworth v. Gaugain* (c); *Evelyn v. Lewis* (d); 17 & 18 *Vict. c. 125*, s. 60.

Mr. *R. Palmer* and Mr. *Cairns*, for the Petitioner, in support of the petition, and in opposition to the motion,

(a) *Kay*, 142.

(b) 3 *Macn. & G.* 104.

(c) 3 *Hare*, 416.

(d) 3 *Hare*, 472.

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Mr. *Follett*, in reply.

*The MASTER of the ROLLS* reserved judgment.

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*April 23. The MASTER of the ROLLS.*

There are, in this case, two matters to be disposed of. The first is a motion, the ostensible object of which is to protect, in the discharge of his duty, a Receiver appointed by this Court to receive the rates and tolls of the *Birkenhead Docks*; and the second is a petition by a judgment creditor, disputing the propriety of the order appointing that Receiver, and claiming a priority, in respect of his judgment, over the Plaintiffs, who are the mortgagees of the rents and tolls of the *Birkenhead Docks*.

The only material and important question is that raised by the petition, and accordingly I proceed, in the first instance, to express the opinion I have formed on this subject, before I proceed to the minor and subordinate question which is raised by the motion.

The question on the petition depends on the construction of the acts of parliament establishing these Docks. The first of these, on which in truth the question depends, is the 7 & 8 *Vict. c. lxxix*, (the subsequent acts being ancillary to this,) which establishes the

(a) 3 *Macn. & G.* 104. (b) 22 *L. J. (N. S.) Ch.* 1084.

the undertaking and regulates the rights and interests of the persons connected with it. The scheme of the undertaking is peculiar. The act does not create a joint-stock company, consisting of shareholders subscribing for the construction and support of the docks, but it creates a body of commissioners, for the construction and support of these docks, consisting of the persons who, for the time being, are commissioners for paving and lighting *Birkenhead*. Apparently, they have no interest in the surplus profits of the undertaking, if it shall be able to realize any, after providing for all the costs and liabilities of the undertaking; but they are, in fact, to carry the scheme into execution, and they are to obtain the funds necessary for that purpose, by borrowing money on mortgage of the rates and tolls authorized by the act to be taken from persons using the docks.

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The persons advancing the money are to have no priority between themselves; the amount of the money to be raised is limited to 400,000*l.*, and the rate of interest is to be specified in the mortgage, a form for which is given in the schedule to the act. The mortgagees have no concern in the surplus profits of the undertaking, beyond the payment of the amount of interest specified in their mortgage bond. The whole affair is to be managed by the commissioners, and the mortgagees are to take no part therein.

By the 8 *Vict.* c. iv, additional powers are given to the commissioners, and, amongst them, a power to raise further sums of money.

In the 10th & 11th years of *Vict.* two additional acts were passed, which are of a similar character, and the former of which constitutes a priority between classes

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of the mortgagees. The fifth act, which is the 11th & 12th *Vict.* c. cxiv, repeals the appointment of the former commissioners, and creates the thirteen persons therein named to be commissioners; six on behalf of the mortgagees, four on behalf of the commissioners for the improvement of *Birkenhead*, three on behalf of the commissioners for the improvement of the parish of *Wallasey*, and converts them into a corporate body under the title of "Trustees of the *Birkenhead Docks*." It provides that the mortgagees, who are, in this act called bondholders, shall elect fresh commissioners to fill up vacancies which may occur, from time to time in the first six trustees; it enacts, that the improvement commissioners for the town of *Birkenhead* are to fill up the vacancies which may arise in the next four trustees, and the improvement commissioners of *Wallasey* are to do the same as to the vacancies which may occur in the last three trustees.

Two other acts have been passed, of the 13th & 14th *Vict.* c. c, and the 16th & 17th *Vict.* c. clxv, but to which I think it unnecessary at present to refer more minutely.

The Petitioner is a judgment creditor of the trustees. Four years ago he sold certain mud barges to the trustees, for the purposes of the works, and became a simple contract creditor for 600*l*.

On the 26th *January*, 1855, he obtained a judgment against the trustees for that amount. On the 2nd *February*, 1855, he obtained an order *nisi* from Mr Baron *Alderson*, calling upon the trustees to shew cause why he should not be allowed, under the Common Law Procedure Act of 1854, to attach the rates and tolls to pay his judgment. On the 8th *February*, Mr. *Powell*

the chairman of the trustees, was appointed Receiver of **these** rates and tolls, without salary and without giving security, and on the 21st of *February* the Petitioner obtained an order from Mr. Baron *Platt*, making the order of the 2nd *February* absolute.

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The first question is, whether, in the absence of any other facts, the Petitioner is entitled to be paid his judgment in priority to the mortgagees or bondholders? and **the** second question is, whether the order appointing a Receiver of the rates and tolls makes any difference in **this** respect, and whether that order is not erroneous and nugatory for any such purpose? For the Petitioner, it is urged, that by the first act and the 17th section, permission is given to the commissioners to enter into contracts; that, by the 21st section, it is provided that they shall not be personally liable; that by the 23rd section it is provided, that execution shall issue against the goods and chattels belonging to the commissioners, by virtue of their office, which is in these words—[*His Honor read it*]. It is contended that this means against all property so belonging which may be taken in execution; and that by "The Common Law Procedure Act of 1854," rates and tolls are property of this description. Reliance is also placed on the 227th section, which provides for the application of the rates and tolls, and which directs that they shall be applied in payment of the costs of maintaining and of constructing the works. All this, it is argued, together with the aid of the Common Law Procedure Act, constitutes a direct authority, not only for taking the rates and tolls in execution to satisfy the judgment debt, but also for taking them in priority to the mortgagees. The construction and maintenance of the docks, it is urged, constitute, in fact, what is first to be paid by the trustees; that this is admitted to be the fact as to future expenses and debts to be hereafter incurred

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incurred in managing and carrying on the concern, and is indeed expressly provided for in the order appointing the Receiver, and that, not only no sufficient reason can be alleged, but that all reasoning and analogy extend this principle and order of application equally to debts already incurred for the same purpose. It is further contended, that the section giving the powers and rights of mortgagees are consistent with and confirm these views. These clauses extend from the 39th to 49th, both inclusive. The 39th section gives the power to borrow on mortgage; the property charged is expressed to be, "the rates and tolls, and any property vested in the commissioners by virtue of the act." The 49th section directs the money to be raised by the mortgages to be applied in payment of the costs and expenses of constructing the works necessary for the purposes of the undertaking; but these sections are all silent as to the course to be adopted by the mortgagees, if their principal or interest remain unpaid. It is insisted, that the consequence of this silence is, that the only mode by which the mortgagees can enforce payment, if at all, is by taking possession of the property mortgaged, and that they cannot do this without stopping the whole undertaking; that they have no power to do anything relative to the undertaking, for the purpose of carrying it on; that all powers for this purpose are confined to the commissioners, and that therefore if the mortgagees take possession, either personally or by their Receiver appointed by this Court, they cannot lawfully levy a rate or a toll, and can exercise no one of the functions which are essential to enable them to obtain payment of their interest; that, on the other hand, if they do not take possession, the trustees remain in possession, who are bound, in the first place, to pay the expenses, and when that is done, then to pay the interest of the mortgagees; and accordingly it is urged, that the
order

order obtained for the Receiver, in this case, is either improper or nugatory ; that, if the Receiver appointed be the Receiver of the mortgagees, it is erroneous to direct him to pay the costs, charges and expenses of carrying on the business, he having no authority to conduct it; and that, if the Receiver be the Receiver of the trustees, then he is only to do what they have to do, and the possession is not altered, and the rights of all parties are unaffected by the change.

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The case of *Russell v. East Anglian Railway Company (a)* is referred to, on both sides, on the subject.

Upon carefully reviewing and considering the provisions of the first act, on the construction of which this question mainly depends, I am of opinion, that the general creditors have no priority over the mortgagees on the rates and tolls of the undertaking, but, on the contrary, that their rights upon them, such as they are, are subordinate to the rights of the mortgagees. It cannot, I think, be put more favorably for the Petitioner than by assuming, which I do for the purpose of considering this part of the case, that the judgment creditor, at the time when the first act passed, could have taken the rates and tolls in execution to satisfy his judgment. On that supposition, I think it material to consider how the matter would stand in the case of an owner of land, a mortgagee, and a judgment creditor. In that event, the question could not be argued. It is clear that the mortgagee who had obtained his mortgage before the judgment would have priority over the judgment creditor. The judgment creditor could take, as against the owner of the land (who would be both the mortgagor and the judgment debtor), only that which formed part of the property of the judgment debtor at the date of the judgment, and as such could take

(a) 3 *Muc. & Gor.* 104.

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take all his interest in the land, but his interest in the land is only an equity of redemption, subject to the payment of the mortgage. To use the words of Sir *James Wigram*, in *Whitworth v. Gaugain (a)*, which is applicable to this part of the case, "A creditor under a judgment takes in execution all that belongs to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability under which the debtor himself held it."

I apply this doctrine to the present case. Under the statute, two classes of property may be mortgaged, viz., property vested in the commissioners by virtue of the act, and the rates and tolls. Suppose the commissioners had purchased land, under the powers given to them for that purpose by the act, and had mortgaged it under the like powers, and a judgment debt had then been entered up against them, the principle, so enunciated by Sir *James Wigram* would clearly apply, and the judgment creditor could only take so much of the land as might not be required to satisfy the mortgage. On what ground can it be reasonably contended, that the same principle does not apply to a mortgage of tolls? Suppose the case of a mortgage of tolls of a market or ferry, would the case be varied? certainly not, in the case of a private person.

There is, no doubt, this difference,—that the tolls, being incorporeal hereditaments, it would be necessary to enter, to prevent the mortgagor or the judgment debtor from receiving them, and consequently the judgment creditor might, if the mortgagee were not in possession under his execution, take the tolls then due, and those

(a) 3 *Hare*, p. 125.

those which subsequently accrued due; but, as soon as the mortgagee thought fit to take possession, the judgment creditor would be dispossessed, and could not take the subsequent tolls. If authority were required for this proposition, it would be found in the case of *Potts v. The Warwick and Birmingham Canal Navigation Company (a)*, which is strictly applicable to this case.

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This would be the law independently of the particular provisions of this act. The priorities therefore must be the same with respect to property mortgaged under this act, unless altered by some specific enactment to be found in the statutes.

In reading through these statutes, for this purpose, I find no words which give the general creditors a priority. I find a power given to the commissioners to make mortgages, and to enter into contracts. I find that these mortgages may be made of rates and tolls, and of the property of the undertaking, and that the general creditors who obtain judgments are enabled to take the goods and chattels of the commissioners, but that the commissioners are not themselves to be personally liable, except in certain specified cases. In all other respects, the rights of all other persons are left untouched, and they remain affected only by the general law applicable to such cases. By virtue of that law, no such priority exists in the general creditors. The 23rd section neither gives it in words nor in spirit. That section appears to me to have been framed for the purpose of aiding the effect of the 21st section, which provides for the absence of personal liability on the part of the commissioners, and, at the same time, gives effect to the rights of judgment

(a) *Kay*, 142.

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ment creditors against the property held by the commissioners in their character, as such. This clause was rendered necessary, because, as the commissioners were exempted from personal liability, and were not a corporation, execution could not issue against their goods without a special enactment.

The subsequent act, which constitutes the trustees a corporation, makes surplusage of this clause, which applies only to actions against the commissioners, and which actions can no longer be brought. The 227th section, which provides that the moneys received by the commissioners shall be applied in payment of the expenses, has reference solely to moneys received by them, and it gives the general creditor no right against persons owing money to the commissioners, or upon moneys which have not, in fact, been received by them, although, as soon as they were received, the rights of the judgment creditors upon them would have arisen. With regard, therefore, to mortgages made by virtue of the authority contained in these statutes, the general law, in my opinion, gives the mortgagees priority over other creditors, unless controlled by distinct enactment, and I find no such enactment.

I look, then, to the policy and general scope of the statutes, and I find here strong reasons for confirming the view I have expressed concerning the particular clauses referred to. In the first place, the undertaking itself, the subject matter which is to create these rates and tolls, is to be constructed with the money to be obtained from the mortgagees, persons who are not shareholders, participating in the general profits of the concern, and therefore wholly distinct from the subscribers of a joint-stock company, who carry on the business, and are, in truth, the real debtors, when a judgment is recovered against the company. It seems
 reasonable,

Reasonable, that persons so situated should have a prior charge on the thing produced by their advances, and accordingly, the legislature, with this view, has omitted to give the mortgagee any practical remedies to enable him to obtain payment of his money, but has left him to the usual remedies provided by the law, which are generally applicable to mortgages.

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If this were not so, and the construction contended for by the Plaintiff were to prevail, the result would be, that under pretence of giving the persons advancing their money a mortgage, the legislature would, in reality, have given them nothing; they would have been in a far better situation if they had advanced their money on no security at all, and had then obtained judgment against the commissioners. It is obvious that, on such terms, the docks never could have been begun, for no one would have advanced his money on such a security. If any persons could have been induced so to do, it would have enabled the commissioners, by confessing judgment for debts incurred, at any time, to have destroyed the interest of the persons to whose moneys the undertaking owed its existence. And this result might have been produced, although the goods and Chattels of the commissioners, "*virtute officii*," were amply sufficient to pay the general creditors who had obtained judgment, but which goods and chattels, not being included in his security, could not be touched by the mortgagee; so that the judgment creditor might take the tolls in priority to the mortgagee, and sweep away the only property available to pay his debts or the interest due upon it. To say, "that such an event could not occur, except by a fraudulent collusion between the commissioners and the judgment creditors, not to be contemplated by the legislature," is no answer to this argument, which, on the general scope and policy

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policy of the act, seems to me to contemplate a state of things, by which the possibility of such an event is precluded.

On the first act alone, assuming that, according to the state of the law as it stood at the passing of it, these rates and tolls could have been taken in execution by the judgment creditors, my opinion is, that the mortgagees of these tolls have priority over the general creditors, as also over a judgment creditor, before execution.

But this view of the case is much strengthened by considering that the first act, standing alone, must be construed with reference to the law as it then stood, and that, by the law then in force, these rates and tolls could not have been taken in execution to satisfy a judgment creditor. If the Common Law Procedure Act of 1854 had not passed, this question could not have arisen. It is, therefore, certain that, when the first act was framed, the legislature considered, that the judgment creditor had not, and could not obtain, any right to or interest in the rates or tolls unreceived by the commissioners. The legislature, therefore, must have contemplated, not that the mortgagees had a priority over unreceived rates and tolls, but that no other person had any right or interest in them except subject to their mortgages.

The legislature might, no doubt, by a subsequent act, have given the judgment creditor a priority over the mortgagee of rates and tolls, but "The Common Law Procedure Act, 1854," does nothing of this kind; it simply gives execution on a species of property not before liable to it. It nowhere alters the construction of any previous act as to the priority of charges upon the property then for the first time made available to pay

pay the judgment debt. If I allowed this claim, I should be holding, that a general act, of a remedial nature, must be held to invert the existing order of priority of charges on property, and to alter the construction of a statute passed several years before.

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The view I have expressed of the construction of this statute is still further confirmed by the statute of 16 & 17 Vict. c. clxv, the last of the acts relating to the docks, in the preamble of which, the order of the charges and liabilities of the trustees is set forth, in which the general creditors are put in the *sixth* place. It is doubtless true, that this preamble is inoperative as an enactment, and that it cannot alter the construction or control the operation of the first act, but it points out the view which the legislature took of the situation of these persons under the prior statutes.

Again, it is clear also, that, if the Petitioner were to succeed, he would gain an advantage for which he never contracted. When he sold the barges and became a creditor, he dealt with a corporation, and had the ordinary remedies which a simple contract creditor had against a corporation. At that time, the rates and tolls were not liable to be taken in execution, and he must be taken to have been cognizant of the law in force at that time; he therefore has no just ground for complaint, if he finds that the Common Law Procedure Act only leaves him exactly in the same situation as that in which he was placed before that act passed.

Although the success of the Petitioner would be very beneficial to himself, nothing could be more injurious to all persons concerned in the undertaking, including the other general creditors themselves, (with the exception of possibly one or two other judgment creditors who might

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might first get execution,) than that this construction should prevail. If the mortgagees took possession, it is to be inferred, either that some arrangement would be made, by which the continuance of the undertaking would be provided for, or, if a Receiver were appointed, that the Court would take care to effect that object; but, if a judgment creditor could intercept the tolls in full, without paying for the necessary expenses, it is obvious that, in a very short space of time, the whole business of the undertaking must be stopped. The judgment creditor who had obtained execution would have no interest in preventing this result, the payment of his debt being the only thing he looks to, and which would be effected out of the tolls then due. Accordingly, the Petitioner claims payment of the gross amount of the rates and tolls, and does not propose, (as indeed he could not,) to do any thing towards the future carrying on of the undertaking.

I am of opinion, therefore, that the mortgagees have priority over the general creditor, even although his debt is secured by a judgment; and although, if the mortgagee were not in possession, the judgment creditor might take the tolls in execution, under the Common Law Procedure Act, I am of opinion that the mortgagees, by taking possession, might stop all further execution for such purposes.

I have hitherto considered this case without reference to the order of the 8th of *February*, 1855, appointing a Receiver, on which it remains for me to make some observations, with reference to this case.

That order was either made by consent or was unopposed. It appointed the chairman of the trustees "to be the Receiver of the rates and tolls and of the rents of the property of the corporation, without salary and without

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without giving security, and it directed him to pay, half-yearly, into Court such balances, if any, as might remain in his hands, after payment of the expenses of carrying on the business, and the interest then due, and to become due on the mortgages. And the Receiver was not to account otherwise, until the further order of the Court," that is, he was not to pass his account annually or at all in the manner usual for Receivers, unless called upon so to do. It is suggested on the part of the Petitioner, that this is no Receiver at all, but merely a mode of continuing the possession in the corporation, in such a manner as may enable it to defeat judgment creditors. And it is argued, that whether it be so or not, it is of no avail against the Petitioner, for that the order is either vicious or fruitless; that either the trustees are dispossessed, in which case every thing done to carry on the concern is illegal, inasmuch as the mortgagees and their Receiver have no power, by statute, of conducting the business of the undertaking; or that the trustees are not dispossessed, and that then this is money received by them for the general purposes of the concern, and applicable, in the first instance, to pay the general creditors, including the Petitioner; and that, if it were not, still it is part of the property of the corporation liable to be taken in execution. The case of *Russell v. East Anglian Railway Company (a)* is much relied upon for the purpose of shewing the defect in this order.

The fact that the order was obtained without discussion does not, in my opinion, vary the right of the parties. I also think that the case of *Russell v. East Anglian Railway Company (a)*, does not support the argument for the invalidity of this order. In that case, the order was too extensive, and it included the moving capital

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capital of the company, and the general goods and effects of the railway. Accordingly, Lord *Truro* held, that the property so taken by the Receiver was improperly included in the order, and that the order must be varied, and that the excepted property was liable to be seized by the Sheriff. In this case, the order appoints a Receiver to take nothing but the rates and tolls and rents, and it is in conformity with the order pronounced by Vice-Chancellor *Wood*, in the case of *Potts v. The Warwick and Birmingham Canal Navigation Company (a)*. This distinction was pointed out and relied upon in the case of *Fripp v. Chard Railway Company (b)*; it is, in my opinion, a material one, nor do the grounds on which Lord *Truro* proceeded in *Russell v. East Anglian Railway Company* exist in the present case.

I am of opinion, therefore, that the order for the Receiver is a valid order, so far as it constitutes the chairman an officer of this Court, and renders him amenable to the jurisdiction, practice and process of this Court in the matter of Receivers. I am of opinion that he is the Receiver of the mortgagees, and that he has, under the order of this Court, removed the trustees from the possession and receipt of the rates, tolls and rents.

I dissent from the argument which suggests, that in that event, the powers of the act vested in the trustees are superseded, and that it has thereby become impossible, so long as this continues, for the undertaking to be lawfully carried on. What the Receiver takes are the rates, tolls and rents. Out of the moneys so received by him, he pays the expenses of the undertaking and the interest of the mortgagees, and the balance into Court.

(a) *Kay*, 142.

(b) 22 *L. J. (N. S.) Ch.* 1084.

**C**ourt. The undertaking continues to be managed by the trustees; they enter into contracts; they engage and dismiss workmen and servants; they do all the other matters which are entrusted to them by these statutes. The expenses they incur in so doing are paid by the Receiver, who, in that character, has nothing to do with the management. He simply pays the bills and moneys which the trustees require him to do, subject to account hereafter, if anything improper should take place in relation to such payment. He then pays the interest due to the mortgagees, and he pays the balance into Court, all of it subject to an account when required. So far from there being, in such a course of proceeding, anything which exceeds the jurisdiction of this Court or the provisions of the statute, it appears to me to be in strict accordance with them, and that, having regard to the scope and policy of these acts, this Court would not have sanctioned the appointment of a Receiver, which had not, as far as possible, provided for the future working and continuance of the undertaking established by the legislature. If no such power of taking possession existed, the mortgage would be a worthless security, and the mortgagee would be at the mercy of the mortgagor, who, in that case, might say to him, "if you attempt to enforce your mortgage, you destroy the property mortgaged." But such is not, in my opinion, the construction of the statute or the operation of the general law upon the provisions contained in it; and my view in this respect is confirmed by the case of *Potts v. The Warwick and Birmingham Canal Navigation Company* (a), to which I have already more than once referred. In truth, that case is strictly applicable to the present, in all respects, except that the judgment in that case had been obtained subsequently

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to the appointment of a Receiver, while in the present, the judgment had been obtained previously. In my opinion, this does not vary the rights; and even if execution had issued previously to the appointment of a Receiver, although the judgment creditor might have taken the rates and tolls then due, which had been previously attached by him in the hands of the garnishees, he would have been liable to be stopped, at any time, by the mortgagee entering into possession, by his Receiver, of the rates and tolls thereafter to become due.

On the petition, therefore, in my opinion, the case raised wholly fails, and this petition must be dismissed and the costs must follow the result.

I have next to consider in what manner the motion is to be dealt with. As the petition fails, it is needless to say that, upon the motion I am of opinion, that the Plaintiffs are entitled to such an order as will prevent the Petitioner from interfering with or molesting the Receiver in the receipt of the rates and tolls and rents of the undertaking. But I have been compelled to look through the affidavits for the purpose of considering the question of costs. On the part of the Petitioner, it is contended, that the motion was, in fact, useless, and that it was only intended on both sides to present, for the determination of the Court and in the most convenient form, the question raised by the petition, and that the Petitioner never intended actually to interfere with the possession of the Receiver, however wrongful that possession might be, and however wrong the order might be by which he was appointed. On the part of the Plaintiffs this is controverted, and they assert, that it was absolutely necessary to make this motion, and that, without it, the interests of the mortgagees, and indeed the undertaking itself, would have been destroyed, or at least very seriously prejudiced.

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There is no question but that this Court will not permit a Receiver, appointed by its authority, and who is therefore its officer, to be interfered with or dispossessed of the property he is directed to receive, by any one, although the order appointing him may be perfectly erroneous; this Court requires and insists, that application should be made to the Court, for permission to take possession of any property of which the Receiver either has taken or is directed to take possession, and it is an idle distinction (which could not be maintained if it were attempted, which it is not by Counsel at the bar. although suggested by the affidavits), that this rule only applies to property actually in the hands of the Receiver. If a Receiver be appointed to receive debts, rents, or tolls, the rule applies equally to all these cases, and no person will be permitted, without the sanction or authority of the Court, to intercept or prevent payment to the Receiver of the debts, rents, or the tolls, which he has not actually received but which he has been appointed to receive. This, in substance, is not disputed on behalf of the Petitioner, but the contest is, as I have already stated, whether the acts of the Petitioner, or rather those of his solicitor and agents, were such as made this motion necessary, for the purpose of protecting the property to be received, and of preventing an interference with the orders of the Court. For this purpose, it is necessary to refer to the dates of the several proceedings, which lie within a very narrow compass.

On the 28th of *January*, 1855, the Petitioner obtained a judgment against the trustees for 600*l*. On the 2nd of *February*, Mr. Baron *Alderson* made an order *nisi* on fifteen garnishees to shew cause why the tolls due from them to the trustees should not be attached to pay the debt of the Petitioner. These orders were served on five of the garnishees on the 3rd, 4th and 5th of

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*February.* Up to this time, the conduct of the Petitioner and his solicitor and agent was perfectly regular and proper, and if no subsequent step had been taken by the Plaintiffs, the Petitioner would properly have received payment of the tolls due from these garnishees.

On the 8th of *February*, the order was made appointing Mr. *Powles* Receiver of the tolls. Notice of the order was given, by letter, on the same day, to Mr. *Watson*, the solicitor of the Petitioner, and was received by him on the 9th of *February*.

[*After going through the subsequent circumstances his Honor proceeded as follows :—*]

It is also to be observed, that during the whole of this time, the injury necessarily occasioned to the traffic and use of the docks, which might make the garnishees liable either to an execution or to double payment of the tolls, was constantly going on, by the service of these orders on them. I cannot but surmise the great probability, that if this notice of motion had not been given, the Petitioner would have obtained from the garnishees, through fear of an execution, the money to which, according to the opinion I have expressed, the mortgagees had the first claim, and I am of opinion, therefore, that this motion was proper and necessary to protect the interest of the Plaintiffs, and to preserve the undertaking itself from injury.

The result is, that in my opinion, an order must be made on the motion, enjoining the Petitioner, his solicitor and agents, from interfering with the functions of the Receiver, or intercepting the payment of any rates or tolls now due or hereafter to become due during such Receivership, and that the Petitioner must pay the costs of the motion.

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**T**HE cause became abated between the hearing and the delivery by the Court of its judgment.

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An abatement after hearing does not prevent judgment being delivered or the decree being drawn up.

**Mr. J. V. Prior** suggested, that the decree could not, under such circumstances, be drawn up, it having been made pending the abatement.

*The MASTER of the ROLLS.*

**I** am satisfied that this presents no difficulty. The point is settled by the case of *Cumber v. Ware*(a).

(a) 1 *Strange*, 426.

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**NOTE.**—See *Davies v. Davies*, 9 *Ves.* 461; *Belsham v. Percival*, 8 *Howe*, 157; 2 *C. P. Cooper*, 176; and 15 & 16 *Vict. c.* 76, s. 139.

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An executor cannot carry on the trade of his testator, except for the purpose of winding it up, but he may, and in some cases is bound, to complete contracts entered into by his testator.

When part of the testator's property is invested on mortgage, the executor is justified in making such further advances as may be absolutely necessary to secure the first advance, *semble*. It would be dangerous to lay down any rule which would prevent the executor

from exercising a *bonâ fide* discretion in such case, or even charge him with a *devastavit* in case the result should disappoint his expectations. In case of loss, however, the *onus* lies on him of shewing that he exercised due caution.

A contract requires two parties to it, and a man in one character can, with difficulty, contract with himself in another character.

A testatrix had advanced money on mortgage of a ship. At her death, it was under repair, and the shipbuilders refusing to part with it until payment, the executor, without due consideration, borrowed money and paid off the lien. He afterwards mortgaged the ship to secure the loan he had contracted. The ship produced less than the sub-mortgage. Held, that the executor's negligence incapacitated him from charging the estate with the advances, and that his mortgagee, having notice, was not in a better condition.

THIS, in form, was a suit to administer the estate of Mrs. *Hannah Hardisty*; but a question of considerable difficulty was raised between the Plaintiff (her residuary legatees) and the *York City and County Bank*, with respect to the proceeds of a ship realized by the bank, on which the testatrix had a lien. The Plaintiffs contended that these proceeds formed specifically a part of the testatrix's assets, and that they ought to be applied accordingly.

The facts were contested, but the Court considered them as established, by the evidence, to be as follows:—

On the 26th of *March*, 1850, the testatrix advanced a sum of 1,500*l.* to a person named *Fletcher*, on the security of a steam vessel called the "*Toward Castle*." In the month of *October* following, *Fletcher* applied to Mrs. *Hardisty* to permit the engines to be removed from the "*Toward Castle*" to another ship called the "*Engineer*," on the terms of her having a mortgage of the "*Engineer*" and of a third vessel, which being already mortgaged

mortgaged proved valueless. Mrs. *Hardisty* consented to this transfer, and on the 30th of *October*, 1850, *Fletcher* executed a deed of that date, by which, in consideration of the transfer of these engines, he covenanted to assign the "*Engineer*," as soon as the transfer of the machinery and other repairs of that vessel he then contemplated, were completed, so that the registry of the vessel and of the mortgage might be effected.

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The Defendant *Lister* acted as the friend and adviser of Mrs. *Hardisty* in these transactions.

The testatrix died on the 24th of *December*, 1850, having by her will appointed the Defendant *Lister* her sole executor, and made the Plaintiffs, her sisters, her residuary legatees. *Lister* proved the will, and acted in the execution of the trusts of it. He took possession of the testatrix's property, which, beyond the interest she had in *Fletcher's* vessels, he represented to amount to 1,070*l.*, and he stated that this was insufficient to pay her debts and funeral and testamentary expenses.

At the death of the testatrix, *Lister* was the agent and manager of the *Goole* branch of the *York City and County Bank*, and in that character had a command over the funds of the bank, and had power to advance them to the customers of the bank, on such terms as he thought fit.

The *Bank Quay Foundry Company* had, during the life of the testatrix, been employed by *Fletcher* to transfer the engines from the "*Toward Castle*" to the "*Engineer*," and to make the other repairs which were required, and on account of which, he paid the company a sum of 443*l.* In *March*, 1851, the company refused to proceed further with the repairs, unless a further sum of 300*l.* was paid to them. *Fletcher*, being unable to pay



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pay this money, applied to the Defendant *Lister* to make him the advance, which he did, in the following manner, as described by himself in his answers:—  
 “The said sum of 300*l.* was procured by me, by a cheque, drawn by me, on account of Mrs. *Hardisty*, on the said Banking Company for the sum of 300*l.*, and the same is debited in the books of the said Banking Company, to Mrs. *Hardisty's* executor.”  
*Fletcher* having afterwards required a further advance for the same purpose, it was made by *Lister*, who in his answer gave the following account of it:—  
 “It was then expected that the sum of 700*l.*, in addition to the sum of 300*l.*, would be sufficient to complete the ship, and I proposed also to advance the sum of 700*l.* to *Thomas Fletcher*, and wrote and sent to Mr. *England*, (who acted as my solicitor in the said transaction,) a letter, dated the 15th day of *March*, 1851, in the words and figures following, that is to say:—‘It is now decided that I, as Mrs. *Hardisty's* executor, shall advance another 1,000*l.* to Mr. *Thomas Fletcher*, and take a mortgage on the ‘*Engineer*’ for 2,500*l.* I think it probable that the family will relieve me of it, rather than allow me to sell, which of course I must do, in the long run, to wind up her affairs. So that you will be good enough to prepare a mortgage to me for 2,500*l.* The ship is to be ready in about a fortnight. In the meantime, Mr. *Fletcher* wants money to pay on account; will it be sufficient to take a memorandum, or ought I not to have a promissory note? He may be knocked on the head. A line by return will oblige.’”

The repairs of the vessel were completed in *April*, 1853, when the Foundry Company, in addition to the sum already paid, claimed a lien on it for 1,598*l.* 4*s.* 5*d.* in respect of their repairs. The vessel could not be  
 got

got from them without satisfying their debt, and thereupon *Lister*, by the intervention and assistance of his solicitor, made a compromise with the company, who agreed to accept the hull of the "*Toward Castle*," and the sum of 1,320*l.*, in full of their demands. The Defendant *Lister* also advanced this sum in the same manner as the former, and in his answer he gave the following account of it:—"The said sum of 1,320*l.* was paid by me to Mr. *England* for the purpose of his paying the same to the *Bank Quay Foundry Company*, and the same was so paid to Mr. *England* by myself, as being money in my hands belonging to the estate of *Hannah Hardisty*, and the same was accordingly paid by Mr. *England* on my behalf, as executor of *Hannah Hardisty*, to the *Bank Quay Foundry Company*. The sum of 1,320*l.* was procured by me by a cheque drawn by me on the banking company, and signed as follows,—'*Francis Lister (Hardisty's executors)*'. And the same was debited in the books of the banking company, as follows,—"*Hardisty's executors, 1,320*l.**," making altogether 1,620*l.*, for there was only 300*l.* advanced before, and the 700*l.* formed, in fact, part of the 1,320*l.* *Lister*, in his answer, also stated, that the transactions took place without any communication by her with the directors, or any persons having the management of the banking company.

The testatrix never had any account with the bank, and *Lister* opened no account as her executor; and, except the taking those two sums out of the monies of the bank, which were within *Lister's* absolute control, and making the two entries already stated in the bank books, there was no dealing with the bank by any one on behalf of the testatrix or her estate.

By indenture dated 26th April, 1851, reciting the  
advance

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advance of the sum of 1,500*l.* by Mrs. *Hardisty*, and the advance of the two sums of 300*l.* and 1,320*l.* by *Lister* in his character of executor, *Fletcher* assigned the "*Engineer*" to *Lister* to secure payment of these three sums, and interest thereon at 5 per cent. per annum, and also covenanted to pay them. On the 5th of *May* following the ship and mortgage were registered.

In the end of the year 1851, the directors of the bank, on inspecting the accounts of the *Goole* Branch, discovered the two entries of 300*l.* and 1,320*l.* debited to "*Hardisty's* executors." They made further inquiry, and ascertained that *Lister* was the sole executor, and that he had, in fact, as manager of the branch bank, advanced these sums to himself, as the executor of the testatrix. The directors of the bank thereupon insisted upon *Lister's* depositing with and transferring to them the securities held by him on the vessel. This he accordingly did, and an indenture, dated the 15th of *January*, 1852, was executed by *Lister*, of the first part, and Mr. *Price* and Mr. *Meek* (two of the bank directors) of the second part, whereby, after reciting the indenture of assignment by *Fletcher* to *Lister*, of the 26th of *April*, 1851, and the registry of the vessel on the 5th of *May*, 1851, and that these three sums of money were due to *Lister*, and that he had applied to and requested *Price* and *Meek*, (the two directors,) to advance and lend him a sum of 1,620*l.*, which they had agreed to do, on having the repayment thereof, with interest, secured by a transfer of the three sums of 1,500*l.*, 300*l.* and 1,320*l.*, and the interest thereof respectively, and an assignment of the ship made to them, in the manner thereafter expressed, the indenture witnessed, that, in pursuance of the agreement and in consideration of 1,620*l.*, *Price* and *Meek* paid to  
*Lister*,

*Lister*, upon or before the execution of the indenture, the receipt whereof was thereby acknowledged, *Lister* assigned to *Price* and *Meek* the three principal sums of 1,500*l.*, 300*l.* and 1,320*l.* so due to *Lister*, in trust to secure the payment of 1,600*l.* and interest. *Lister* then assigned to *Price* and *Meek*, the ship "*Engineer*," with the appurtenances, to hold, subject to the equity of redemption, until payment of the three several sums, with power to sell and give receipts for the money.

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Under the power of sale contained in this instrument, the banking company sold the ship for 1,150*l.*, and received the purchase-money.

In this state of things, the Plaintiffs filed their bill against *Lister* and the bank, praying an account of what, but for wilful default, *Lister* might have received as executor of Mrs. *Hardisty*, and that her estate might be administered by the Court, and praying a declaration, that *Lister* had no authority to pledge the 1,500*l.* due to Mrs. *Hardisty*'s estate on the security aforesaid, or any part of the testatrix's estate for securing the same, and that the sum of 1,500*l.* was a first charge on the "*Engineer*." And praying, that the bank might be ordered to account for all money received by them for the "*Engineer*," and to deliver up to the Receiver in the cause the mortgage, transfer and certificate of registry of the "*Toward Castle*," and that the necessary steps should be taken to realize the amount due to the estate of Mrs. *Hardisty*, in respect of the advance to *Fletcher*; and praying that a Receiver might be appointed.

Mr. *Roupell* and Mr. *Amphlett*, for the Plaintiffs. The estate of the testatrix is entitled to the first charge on the purchase-money of the ship. The advances made by *Lister*, after the testatrix's death, for the repairs, were perfectly

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perfectly unjustifiable. He neglected to take those steps which common prudence demanded, before making an additional outlay. He took no pains to ascertain the value of the ship when repaired, he obtained no valuation and made no inquiry. If he had, he would doubtless have ascertained, that any further advance on the ship would be totally lost. His acts amounted to a *devastavit*. But, independently of his neglect, the will conferred on him no power to advance money on the security of the ship, and in his simple character of executor he had no authority to do so. He ought rather to have pressed *Fletcher* for payment of the amount due to the testatrix, but there is no evidence either of any attempt to compel him to pay or to force him to discharge the claims of the shipbuilders out of his own funds, or from money derived from other sources.

The lien of the shipbuilders ceased on their being paid, and it does not now exist for the benefit of any party. The money borrowed from the bank was a mere personal debt from *Lister* to the bank, which in no way concerned the estate of the testatrix or the persons interested in it, and *Lister* had no right to pledge the ship for his own debt, or to give to the bank priority over the persons beneficially interested in the ship. The bank, through *Lister*, their manager, had notice of all the facts known to *Lister* himself, and cannot stand in a better position than *Lister*. They cited *Wilson v. Moore*(a); *Hughes v. Morris* (b); *M'Calmont v. Rankin* (c).

Mr. *Follett* and Mr. *Robson*, for *Lister*, contended,  
 first,

- (a) 1 *Myl. & Keen*, 337. (c) 8 *Hare*, 1; 2 *De G. M. & G.* 403.  
 (b) 9 *Hare*, 636; 2 *De G. & G.* 349.

First, that, in his character of executor, he was authorized to advance the testatrix's assets for the purpose of securing her mortgage debt. And that, supposing him to have acted *bonâ fide* in so doing, the result, whether attended with more or less success, would not affect the question of breach of trust or *devastavit*. Secondly, assuming that he was entitled to advance money out of the estate for the purpose in question, he was equally entitled to borrow money from the bank for the same purpose, as he had done.

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Mr. R. Palmer and Mr. J. V. Prior, for the banking company, claimed such interest only as their agent, Lister, could have claimed. They argued that Lister was entitled to stand in the place of the shipwrights and to have the benefit of their lien, which was paramount to the claims of Mrs. Hardisty, for without payment the shipwrights would never have parted with the ship; and the money produced by its sale, which was attributable to the repairs, would never have been realized. That the executor had full authority to pledge any part of the assets, for moneys borrowed for the purposes of the estate, and that he had done so, in the present instance. They referred to *Buxton v. Buxton* (a); *Hughes v. Morris* (b).

Mr. Roupell, in reply.

The MASTER of the ROLLS said, the case involved a question of considerable nicety, and he would take time to consider it and read the evidence.

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(a) 1 Myl. & Cr. 80.

(b) 9 Hare, 636.

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*The MASTER of the ROLLS.* (After stating the facts.)

The question to be determined is the effect of these transactions; and for this purpose, I think it material, first, to consider the effect of them, as between the Plaintiffs and the Defendant *Lister*, without having regard to the interests of the banking company; because, in my opinion, the interests of the bank must, in a great measure, depend upon the effect of the transactions between *Lister* and his *cestuis que trust*. In my opinion, the testatrix consented to the transfer of the mortgage; if, therefore, the ship "*Engineer*" produced nothing after her decease, that loss would have fallen on her estate. It is also clear, that the Foundry Company, who repaired the ship and transferred the engines, had a lien on the vessel for their proper costs of such repairs; and that, except by discharging those costs, the vessel could not have been registered, or the mortgage on it made available. It is also, in my opinion, equally clear, first, that *Fletcher*, by discharging these costs and expenses out of his own moneys, could not have defeated or prejudiced the mortgage he had covenanted to give to the testatrix; and next, that, if he had borrowed money for that purpose, from a stranger, who had received notice of the testatrix's mortgage, that stranger could not have obtained from *Fletcher* a priority over the testatrix's mortgage.

*Lister*, therefore, could not, by advancing his own moneys to *Fletcher*, have obtained such a priority, neither could he, as agent for the bank, and by advancing moneys on account of the bank to *Fletcher*, have obtained for his principals such a priority. But this is not the way in which the advance was made, and the facts, as I have stated them, must be borne in mind in considering this matter.

matter. It is contended on behalf of *Lister*, first, that, in his character of executor, he was entitled to advance the assets of the testatrix to make her mortgage available; and that, if he acted *bonâ fide*, the greater or less success of the result cannot affect the question of breach of trust; and, secondly, that, if he was entitled to advance the assets of his testatrix for this purpose, he was equally entitled to borrow money for that purpose, and that this was what he did.

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This opens a question of great importance as regards the powers and liabilities of executors in the discharge of the duties intrusted to and undertaken by them.

The acts which an executor, in the absence of any directions contained in the will, can do or ought to do, for the purpose of completing or rendering available the contracts or property of the testator, depend so much on the peculiar circumstances of each case, that I find it difficult to state, with distinctness, any proposition which shall lay down a principle applicable to all cases. Some points, however, are settled: thus it is clear, that an executor cannot carry on the trade of the testator, except for the mere purpose of winding it up. But the executor may and in some cases is bound to complete contracts entered into by his testator, and the instance of a testator, who had contracted to build a house and had died, having provided the materials and half completed the work, was cited and relied on at the Bar<sup>(a)</sup>, as an undoubted instance, where the executor's duty would be to complete the imperfect work. Mr. *Toller* also, in his book on *Executors* <sup>(b)</sup>, mentions a case, where the testator, carrying on the business of a wine-cooper, had left a stock of wines,

(a) *Marshall v. Broadhurst*, 1 Cr. & Jer. 403.

(b) Page 487.



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wines, which could not have been advantageously sold, unless the executor had purchased other wines for the purpose of refining the old stock, and which act was held not to constitute him a trader, but to have been done in due discharge of his duty as an executor. If a testator had advanced money on mortgage of a property either originally insufficient to pay the amount, or which had become so by some subsequent accident, and the owner of that property, (the mortgagor,) had applied to the executor for a further advance, stating, with truth, that the outlay of this further money would render the property sufficient to pay both charges, I know of no case or principle which would preclude an executor from advancing such further sum out of the assets of the testator, in order to render the property capable of paying the original mortgage, which, without such expenditure, would not have been possible; and it would, I think, be dangerous, to lay down any rule which would prevent the executor from exercising a *bonâ fide* discretion in any such case, or even to charge him with a *devastavit*, in case the result should disappoint his expectations. But if a loss should be the result, it appears to me to be a necessary preliminary condition, before such advances could be allowed to him in taking his accounts, that he should have carefully investigated the probabilities of success, before he advanced the money of his *cestuis que trust* for any such purpose. The expenditure of money to recover other money lost or in danger is a matter which requires very careful and grave consideration; and if the result prove that the transaction is such as only to create an additional loss, it is incumbent on the executor to shew, that he used every available means in his power to ascertain the chance of success; and that, if he did what was unfortunate, he acted as a reasonable man would have done, in similar circumstances, with reference to his own property, and after

after he had obtained all the evidence possible relative to the chances of success or failure.

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I apply that rule to the present case, and I treat this matter as if this were an ordinary suit for the administration of the testatrix's estate, and that Mr. *Lister*, having had 1,900*l.* belonging to her estate in his hands, had advanced, first, 300*l.* and then 1,600*l.*, for the purposes detailed in his answer and evidence, and that, having so done, he now sought to have these advances allowed to him in taking his accounts.

In this point of view, I think that this sum of money could not be allowed to Mr. *Lister* in taking his accounts. He did not, in my opinion, take the precautions which were fitting and proper before he advanced this money; and that if he had done so, he would not, acting prudently, have advanced this money. In the first place, there is no evidence before me, that *Fletcher* might not, from other sources, have obtained the first sum of 300*l.*, which, if he had done, it would not have affected the testatrix's mortgage; if he could not, the necessary inference is, that such inability arose from the fact, that the security of the ship was not sufficient to cover such an additional advance. With regard to both sums, Mr. *Lister* seems to have taken no pains to ascertain what would have been the value of the vessel, even after that payment, or whether the advances could safely be made. The burden of proof to establish this lies on him who seeks to be allowed a sum which has been wholly lost to the testatrix's estate. He took no step whatever for this purpose, yet the fact that the Foundry Company, who were repairing the ship, would not proceed further without an advance, was very strong evidence, whence it might be inferred, that, in their opinion, it was at least probable, that the ship, when completed, would

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would not be worth more than the money due for repairing it. This is confirmed by the evidence before me, for even the agent of the company who repaired the ship does not put the value, at the utmost, as exceeding the bill due to them. It is obvious, therefore, that *Lister* took no pains to investigate the matter at all, and that, if he had done so, he would have discovered that it was a foolish and rash matter to advance further money; but that, if nothing could be realized from the property as it stood, nothing could be got by advancing further money upon it.

In the case, therefore, which I have supposed, of Mr. *Lister* having in his hands assets belonging to the estate of the testatrix, I am of opinion, that these advances could not be allowed to him in taking this account, but that he would have to be charged with that amount, as a loss improperly occasioned by him to the estate.

The case, however, becomes much stronger against him, when it is considered, that he borrowed money for this purpose, which is always a more hazardous proceeding than the laying out of money already existing. If the matter had rested between the Plaintiffs and *Lister*, and the interests of no other persons had been concerned, this point, in the present state of the assets, would have been immaterial, for no assets exist out of which *Lister* could seek for payment, and it could not be contended that the Plaintiffs were liable to repay the advances made. The consideration of the point, however, has become important, for the purpose of determining the ulterior question affecting the banking company.

On the first question, viz. that which arises between the Plaintiffs and the Defendant *Lister*, therefore, I am  
of

of opinion that, if there had been further and other assets of the testatrix, exceeding the 1,900*l.* advanced, *Lister* could not have been entitled, out of those assets, to the repayment of the two sums advanced by him in the manner and under the circumstances I have already stated.

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I now come to the consideration of the next question, which regards the interest of the banking company and the claim made by the Plaintiffs against them. I consider this, in the first instance, independently of the deed of the 16th *January*, 1852, and I shall then consider how it is affected by that deed. The mode by which these sums were appropriated by Mr. *Lister*, in *April*, 1851, I have already noticed. He was both the borrower and the lender. It is not denied, that, as the agent of the bank, he had the authority, as well as the power, to advance the money of the bank to such persons as he should think fit; and all facts known to him, as executor, were also known to him as agent of the bank, and must bind and conclude the banking company, exactly in the same manner as if they had acted directly in the transaction with full notice of them. The circumstance of his also being the executor does not, in my opinion, affect or alter the transaction, and I look at it exactly in the same light as I should do, if he had advanced money to a third person, who had been the executor of the testatrix, and that when he did so, he knew all the facts connected with the estate, and knew the purposes for which it was advanced.

It was, therefore, an advance by the agent of the banking company, on behalf of that company, to the executor of the testatrix, without taking any security from him, and made in order to enable the executor to lend the money to *Fletcher*, to be by him applied in

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discharging a lien which the ship builders had on the "*Engineer*," and all this, coupled with the knowledge that *Fletcher* had covenanted to mortgage that vessel to the testatrix, and that the mortgage constituted the first charge on that vessel, as soon as it was registered.

If the agent of the bank and the executor had been distinct persons, and the money had been advanced by the agent of the bank, upon an assignment of the testatrix's mortgage by the executor, and without a knowledge of the purpose for which the executor required the money, the case would have been wholly different, and whatever might have been the rights of the *cestui que trust* against the executor, it would not have affected the bank; but no such contract is made. The union of both characters in *Lister* would have rendered it extremely difficult to make any contract to this effect, which would have been legal and effectual. A contract requires two parties to it, and a man in one character can, with difficulty, contract with himself in another character. But, in this case, it is not even alleged that the original advance was made on the security of the testatrix's mortgage; on the contrary, nothing was done with reference to it. Probably Mr. *Lister* thought that the vessel would be able to pay both charges, but whether this was so or not, all that occurs is, the introduction of the two entries in the books of the bank, which entries I consider as wholly inoperative for any purpose, except to shew the object for which *Lister* wanted and took the moneys. The facts I consider to be in effect, nothing more than this:—that *Lister* advanced the money of the bank, in his own person as agent, to *Fletcher*, and took an assignment of the ship to himself, in his name of executor, to secure these advances, in addition to the prior mortgage to the testatrix. But even regarding it as a *bonâ fide* advance

by the bank to the executor, for the purpose for which it was applied, it could not, in my opinion, be allowed to the bank against the assets of the testatrix. As an advance to the executor of the testatrix, it might bind her assets, if it had been properly and beneficially applied for the purposes of her estate, that is, if the *cestuis que trust* had had the benefit of it. In that event, the bank would have been entitled to be repaid out of the assets of the testatrix, because the executor would have been so entitled; but the right of the bank is to stand in the place of the executor, and it is here confined to his right as against the assets of the testatrix. But I have already stated my opinion, that in this case, the executor could not be allowed these sums against the assets of the testatrix. If a man, without taking any security, advances money to another, who is an executor, and the executor informs the lender that he requires the money for the purposes of the testator's estate, but in fact misapplies the money, that cannot bind the persons interested in the testator's estate, but constitutes simply a general debt from the borrower to the lender. "Whatever may have been the old decisions upon this subject" (I am quoting the words of Lord *Manners*, in the case of *Downes v. Power* (a)), "it is now clearly established, that whoever will deal with an executor for the assets of the testator, for a purpose perfectly inconsistent with the due administration of the assets, subjects himself to the consequences of a *devastavit*." I think that the same observation applies to a person who advances money to an executor, confessedly for a purpose relating to the testator's estate, which is perfectly inconsistent with the due administration of the trust, and that he does not thereby acquire any charge on the assets of the testator. When the person lends money to an executor,

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(a) 2 B. & B. 498.

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ecutor, in order that he may apply it for the purposes of the testator's assets, this is a personal debt of the executor; but if, in addition to that, the lender claims repayment out of the testator's assets, it can only be in case he can shew that the executor himself would be allowed that sum, in taking the accounts of the testator's estate. This is, in my opinion, the case as it originally stood, and the original loan of the money does not, therefore, give the banking company any lien on any part of the assets of the testatrix.

I now come to the deed of assignment of the 16th of January, 1852, between Mr. *Lister* and the two directors of the bank, which is, in form, an assignment of the three debts due from *Fletcher* and of the ship, to secure a sum of 1,620*l.*, then for the first time advanced by the banking company. From what I have already stated, it follows, that if this had been the real transaction, it might have constituted a good assignment of the property therein mentioned to secure that advance. But the real transaction is not expressed on the face of the deed; no money was then advanced by the bank; it was, in truth, only an attempt to secure the sum already advanced upon no security at all, and by that means, with a full knowledge of the whole transaction and of all matters relating to it, to obtain a priority over the prior mortgage of the testatrix on this ship. In my opinion, neither the testatrix's mortgage nor the interests of the residuary legatees are affected by this deed. It leaves the matter exactly as it stood before it was executed. The deeds and their recitals disclose fully all matters relative to the mortgage to the testatrix, and the subsequent advances of money by Mr. *Lister*, and if these prior transactions did not give the banking company a charge on the testatrix's assets, or on the mortgaged ship, as a part of them, this deed did not

in my opinion, mend their position in this respect. In fact, on this part of the case, I consider it as coming within the principle of the decision of Lord Brougham in the case of *Wilson v. Moore* (a).

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It is also to be observed, that this case is free from any question respecting the lien of the ship builders, because no assignment of that lien was attempted to be taken, if it could have been; but that lien, whatever was the value of it, disappeared, as soon as the money was paid to them and the vessel was registered under the Registry Act.

The short result of my opinion is, that Mr. Lister was not justified in making the original advance to *Fletcher* out of any assets of the testatrix; and that such advance being made by him, as agent of the bank, with a full knowledge of the testatrix's mortgage, it did not affect that mortgage, or give the bank any priority over it; and that, although it may have given the banking company a charge on the vessel, it did not displace the prior charge of the testatrix; and, consequently, that the proceeds of the sale of the vessel are to be applied, in the first instance, in payment of what is due on that charge, and after payment of that amount, of what is due to the banking company. As, however, the ship has not produced sufficient for the first purpose, I am of opinion that the banking company must pay the 1,140*l.* into Court, to the credit of the cause, to be administered as part of the assets of the testatrix.

I shall make the usual decree to account against Mr. Lister, but in taking that account, no allowance is to be made to him in respect of the two sums of 300*l.* and 1,300*l.*,

(a) 1 *Myl. & Keen*, 337.



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1,300*l.*, obtained by him from the moneys of the bank-  
 ing company, and I shall declare, that the testator's  
 estate is not liable to repay those sums or any part  
 thereof. I shall stay all further proceedings in the suit  
 against the Defendants, who represent the bank-  
 ing company. But as the suit has, in my opinion, up  
 to this point, been occasioned by the contention of the  
 banking company and of the Defendant Lister, which  
 I am of opinion cannot be sustained, they must pay the  
 costs up to and including the hearing; the future costs  
 will be dealt with as in an ordinary administration  
 suit.

Reserve further consideration.

NOTE.—Affirmed on appeal by the Lords Justices on the 3<sup>rd</sup>  
 December, 1855, who, in addition, charged the Bank with interest  
 4 per cent.

### *In re* The TIVERTON MARKET ACT.

*Ex parte* TANNER.

March 29.  
 April 16.

Under a de-  
 vise to the  
 children of A.  
 and to the  
 heirs of their  
 respective  
 bodies, the  
 children take  
 as joint te-  
 nants for their  
 lives, with  
 several inhe-  
 ritances in tail,  
 but under a  
 devise to them

THE testator devised some freehold property to his  
 wife *durante viduitate*, with remainder to his son  
 Henry Marder, for life; and from and after his decease  
 unto the child and children of his body lawfully to be  
 begotten, and to the heirs of their respective bodies law-  
 fully issuing. He then proceeded as follows:—"And in  
 default of such issue, then I give and devise the  
 said dwelling-houses, gardens and premises unto Sarah  
 Marder,

and the heirs of their bodies respectively, they take as tenants in common in tail.

A devise to A. and B. and their "respective heirs," gives to them a joint tenancy  
 for life with several inheritances in fee.

*Marder*, my daughter, for and during the term of her natural life, and from and after her decease, then I devise the said dwelling-houses and premises unto the child and children of her body lawfully to be begotten, and to the heirs of their respective bodies lawfully issuing."

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The  
TIVERTON  
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The testator died in 1776 and his widow in 1795. The testator's daughter married *Tanner*, and had six children; she died in 1840, and in 1844 *Henry Marder* died without having had issue, at which time some of the children of the testator's daughter were dead.

The property was compulsorily taken under the *Tiverton* Market Act (6 Geo. 4) (a) for the purpose of the act, and the purchase-money was paid into Court, and invested in 416*l.* 1*s.* consols. A disentailing deed having been executed, a petition was presented by some of the children to obtain payment out of Court of the fund, and a question arose as to the estates taken by the children under the above devise.

Mr. *R. Palmer* and Mr. *Karslake*, in support of the petition, contended that the word "respective," attached to the gift to the heirs of the bodies of the children, had the effect of severing the respective shares of the children, and of creating a gift to a class of children as tenants in common in tail.

Mr. *Berkeley*, for the *Tiverton* Market Company, asked for his costs out of the fund. [*The MASTER of the ROLLS.* No; it is for their benefit that there should be no investment.]

Mr. *Schoyn*, for one of the children. The children take as joint tenants for their lives and the life of the survivor,

(a) Chapter cxxxix.

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survivor, with separate inheritances in tail, for a gift to several (who cannot intermarry), and the heirs of their bodies, is a joint tenancy for life, and several inheritances in tail; *Forrest v. Whiteway* (a); *Edwards v. Champion* (b); *Co. Litt.* (c); 2 *Jarm. Wills* (d). The word "respective" applies only to the heirs, and not to the children, and the recent case of *Doe d. Littlewood* (e) is an authority exactly in point.

Mr. R. Palmer, in reply, contended that the authorities could not be applied to a case like this, where there was an evident intention to sever the shares, and that the intention to sever was the same, whether annexed to the words of inheritance or to the original gift. That the object and effect was the same, whether the words of severance were at the beginning or at the end of the clause, and that this devise was the same as if the gift had been "to the children respectively, and to the respective heirs of their bodies."

*The MASTER of the ROLLS* reserved judgment.

April 15.

*The MASTER of the ROLLS.*

I am of opinion that these words create a joint tenancy for life, with several inheritances in tail. It is not disputed that "if lands be given to two men, and to the heirs of their two bodies begotten, in this case the donees have a joint estate for the term of their two lives, and yet they have several inheritances in tail" (f). But it is contended, that in the present case, the word "*respective*" creates a tenancy in common in tail, and that the expression applies not only to the inheritance, but to the whole estate.

(a) 3 *Exch.* 367.

(b) 1 *De G. & Sm.* 77.

(c) Page 184a.

(d) Pages 158—206 (2nd ed. —)

(e) 4 *Mees. & Wels.* 229.

(f) *Littleton's Tenures*, s. 285.

estate of the children. I think, however, that the word "respective" expresses only that which the law would imply without it. If lands were given to a man and woman, and the heirs of their bodies, this would be an estate in special tail (a), and the word "respective," if introduced before the word "heirs," would have the effect of making the man and woman joint tenants for life. It would be the same as if the gift were to a man and woman who could not marry, and the heirs of their bodies. So if an estate were devised to two and their heirs, they would be joint tenants in fee simple, and if not severed the survivor would take the whole; but if the words "respective heirs" were introduced, and it were a devise to A. and B. and to their respective heirs, I should be of opinion that they were joint tenants for life, with several inheritances in fee (b). I think I must give the same effect to these words as I should in the case suggested, and I must confine the application of the word "respective" to the inheritance given after the estate to the children. If the devise had been "to the children and the heirs of their bodies, respectively," I should have held them tenants in common in tail. Here the expression "respective" is limited to the inheritance, and these are fit words to create a joint estate for life, with several estates of inheritance in tail. I think it would be impossible to give any other construction to these words, if the question arose upon a deed, and there is nothing from which I can come to a different conclusion when they are used in a will. The children were therefore joint tenants for the term of their lives, with several inheritances in tail.

(a) *Littleton's Tenures*, s. 16. 4 M. & W. 229.  
 (b) *Doe d. Littlewood v. Green*,

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 TANNER.

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March 29.

April 16.

The Court, under very peculiar circumstances, ordered the whole income of a fund in Court belonging to a *feme covert*, who had committed adultery, to be paid to her, on terms.

### *In re LEWIN'S TRUST.*

ON a marriage, the wife had brought 2,000*l.* in settlement, and the husband about 3,000*l.*, and he had also bound his estate for about 5,000*l.* more. These funds had been settled on the husband for life with remainder to the wife for her life, for the support of herself and children, with remainder to the children.

The wife committed adultery with a foreigner, and the husband obtained a divorce *a mensa et thoro*, but not a *vinculo matrimonii*, in which case, he could not have interfered with her enjoyment of her future-acquired property. The husband had procured her to be imprisoned in *Paris* in the common gaol, and refused her any support, except on humiliating terms.

The husband's income was 1,500*l.* per year, but the wife had none, and she continued to live with the adulterer, by whom she was supported. She became entitled to 1,323*l.* 6*s.* 7*d.* three per cent. reduced, which had been paid into Court by the trustees of a will.

The husband now presented a petition for payment of the 1,323*l.* 6*s.* 7*d.*

The wife presented a cross-petition, claiming an equity to a settlement out of that fund.

Mr. Lloyd and Mr. Goldsmid, for the husband.

Mr. R. Palmer and Mr. Shapter, for the wife.

The following cases were cited, *Barrow v. Barrow* (a); *Moore v. Moore* (b); *Ball v. Montgomery* (c); *Carr v. Eastbrooke* (d); *Bullock v. Menzies* (e); *Greedy v. Lavender* (f); *In re Anne Walker* (g); *Coster v. Coster* (h); *Ball v. Coutts* (i).

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~~~~~  
In re
LEWIN'S
Trust.

The MASTER of the ROLLS ordered, that, upon the wife undertaking to reside in *England* and to have no further communication with the adulterer, who was abroad, 100*l.* and her costs should be paid out of the 1,323*l.* 6*s.* 7*d.* reduced, and that the residue should be carried to a separate account and the income paid to her for life, subject to further order, with liberty to apply as to capital. But he directed the order not to be drawn up, in order to see whether the husband would make a better arrangement.

On the 16th of *April*, 1855, it was ordered, by arrangement, that the husband should pay her 100*l.* a year, and 100*l.* down, to discharge some of her pressing debts and to enable her to pay for a small outfit:—that all costs should be raised out of the 1,323*l.* 6*s.* 7*d.*, and that the dividends of residue should accumulate and be added to the capital for the children, subject to further order.

April 16.

(a) 18 *Beav.* 535.(b) 1 *Atk.* 272.(c) 2 *Ves. jun.* 191.(d) 4 *Ves.* 146.(e) 4 *Ves.* 798.(f) 13 *Beav.* 62.(g) *LL. & G. temp. Sugd.* 299.(h) 9 *Sim.* 604.(i) 1 *Ves. & B.* 304.

1855.

YONGE v. FURSE.

April 18.

A. B. purchased an estate in consideration of an annuity. It was thereupon charged upon the purchased and also on another estate, and *A. B.* covenanted to pay it. On *A. B.*'s death, *Held*, that his personal estate was the primary fund for payment of the annuity.

IN 1848, the testator, *John H. Furse*, purchased "the *Beaford* estate" from *Wheeler*, in consideration of a life annuity of 500*l.* By the conveyance, after reciting that the annuity was to be secured by the covenant of the testator and a charge, *Wheeler* conveyed the estate to *Furse* and his heirs, to the use and intent that trustees should receive thereout a rent-charge of 500*l.* a year, during the vendor's life, in trust for the vendors, with powers of distress and entry, &c., and subject thereto, to the use of *Furse* absolutely. Mr. *Furse* covenanted to pay the life annuity, and by an indenture of even date, he also charged an estate of his own, called *Hartland*, with payment of it.

The testator died in *August*, 1854, intestate as to his real and as to the residue of his personal estate, and the question now arose, between his heirs and next of kin, which was the primary fund for the payment of this annuity. His co-heirs contended, that it was payable out of the personal estate, and the next of kin insisted, that it was charged primarily on the *Beaford* and *Hartland* estates.

Mr. *R. Palmer* and Mr. *Surrage*, for the Plaintiffs. The annuity is payable out of the personal estate. The deed of conveyance recites, that the annuity was to be secured by the covenant of the testator and by a charge. The covenant, being mentioned first, shews that it was the first security, and the word "secured" points to the personal obligation alone.

Mr. Follett and Mr. C. C. Barber, for the other co-heir. The security for payment of the annuity is threefold: first, the covenant by the testator to pay; secondly, the charge on the purchased estate; and thirdly, the charge on the auxiliary estate. Now the contract is *prima facie* a personal contract, and the covenant to pay is absolute, the primary fund, therefore, for payment is the personal estate, as in the case of a mortgage; *Barham v. Earl of Thanet* (a); *Waring v. Ward* (b).

Mr. Bagshawe and Mr. Bagshawe, jun., for some of the next of kin. The *Beaford* and *Hartland* estates are primarily liable to the payment of the annuity. It is true, that in the recital of the contract in the deed of conveyance, the covenant is mentioned first, but then the conveyance is to the use that the trustees shall receive and take 500*l.* a year out of the estate, and hold the same on trust for the vendors. An agreement of this kind entitles a vendor of the land, not only to the security of the charge, but to the covenant of the purchaser for the payment of the annuity; *Bower v. Cooper* (c); but the substantial contract was, that a rent-charge should be granted out of the estate, and that the vendor should thus retain a part of the estate. The personal covenant was intended only to come in aid of and as a security for the rent-charge. But it is said, that the contract is personal, and the case of a mortgage is referred to, in which the money, though charged on the land, is payable out of the personal estate, except where the late act, in certain cases, makes it primarily a charge on the land. This case is not, however, similar to that of a mortgage, it is not one where a mortgagor raises money for his own purposes and secures its repayment by a mortgage, in which case the estate is merely pledged for the debt which is to be paid out of the personal estate. Here there

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(a) 3 *Myl. & K.* 607.
 (b) 7 *Ves.* 332, 336.

(c) 2 *Hare*, 408.

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there is no debt but a legal rent-charge. When a mortgage is given as a security for raising a sum of money for a special purpose, and not to secure a debt of the mortgagor, even though the mortgagor covenants to pay the money, it is not primarily payable out of the personal estate. The covenant is "merely a matter of form and only auxiliary." In *Graves v. Hicks (a)*, a father agreed to secure a marriage portion for his daughter, and mortgaged land for that purpose, and he covenanted to pay the money; it was held, that the mortgaged land was not to be exonerated out of the personal estate. This is a legal rent-charge payable out of the estate, and the personal covenant is merely thrown in as an additional security, it being the intention, that the real estate should bear the burden; *Ker v. Clobury (b)*. In *Hickling v. Boyer (c)*, a testatrix having bequeathed leasehold property, which was held subject to a covenant to repair, it was held, on general principles, that the legatee must take it *cum onere*, and subject to the dilapidations existing at the testatrix's death; *Coote on Mortgages (d)* was cited.

Mr. Jessel (in the absence of Mr. Roupell), for the testator's widow. This is a case of a simple rent-charge. No authority can be produced for the position, that the personal estate is the primary fund to pay a legal rent-charge, and it is contrary to every principle to be derived from the decided cases.

There are three classes of cases, first, where the money secured is the debt of the party securing it; secondly, where it is not, but arises from some arrangement, by which he has agreed to secure it; and thirdly, where, properly speaking, there is no debt at all, but a sum is to be paid or raised under the provisions of a settlement.

(a) 6 Sim. 398.

(b) *Sugd. Conc. View*, 137.

(c) 3 Mucn. & G. 635.

(d) Page 480 (3rd edit.)

settlement, or the like, and in order to raise it, the **owner** of the estate, besides creating the charge, has **entered** into a covenant to pay it. According to the **decisions**, the personal estate is primarily liable, in the first **case**, but not in the latter. Where the estate is the **original** and the covenant only an additional and auxiliary **security**, there, as between legal and personal **representatives**, the first must be exhausted before recourse **can** be had to the second.

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Mr. Lloyd and **Mr. Henry Stevens**, for trustees.

The MASTER of the ROLLS.

I cannot distinguish this from the ordinary case of **the** purchase-money for an estate being allowed to **remain** a charge upon it. The case is not embarrassed **by** the person who advances the money or allows it to **remain** being also the vendor, for if a third party had **advanced** the money to purchase an estate, and in **consideration** of the advance the purchaser had given him a **rent-charge** on the estate and had covenanted to pay the **annuity**, I should have had no hesitation in coming to the **conclusion**, that this would be a debt of the purchaser, payable primarily out of his personal estate. Here a **debt** was contracted by the purchaser to the vendor; for the purpose of securing it, he gave a charge on the estate and a personal covenant to pay it, which bound **his** personal estate. It can make no difference whether the purchase-money was to be paid in a gross sum, or from time to time, by way of an annuity for life; it is **equally** a debt and charge upon the personal estate, and in either case the personal estate is the primary fund to **pay** it.

1855.

HARRIS v. The NORTH DEVON RAILWAY COMPANY.

April 23.

Directors had power, on non-payment of calls, to sue for them or forfeit and sell the shares. They proposed to a shareholder to relieve him from further liability, on his consenting to an absolute forfeiture. He assented, but the Directors, having afterwards discovered that he was in good circumstances, refused to complete. The Court declined to compel the Directors specifically to perform the contract.

The discretion of Directors to forfeit shares for nonpayment of calls is a trust, to be exercised for the benefit of all the shareholders.

THE Defendants, The *North Devon Railway and Dock Company*, were incorporated by acts of parliament, and, by the 68th section of the first of those acts, the directors of the company were empowered to make calls on shares, and it was thereby enacted, that if any owner of shares should neglect or refuse to pay the calls thereon, it should be lawful for the company to sue for and recover the same, or to declare the shares forfeited, and to order them to be sold; provided that no advantage should be taken of any forfeiture without giving notice to the shareholder in writing, and observing the other formalities therein mentioned. In another of the acts, passed in 1847, the Companies Clause Consolidation Act was incorporated. The Plaintiff was at first a registered proprietor of 150 shares, but these were subsequently reduced to 50, on which there being arrears of calls, amounting to 400*l.*, unpaid, a correspondence relative thereto took place between the Plaintiff and the solicitors of the company, which resulted in a letter from the solicitors to the Plaintiff dated 8th *November*, 1854, and written by the order of the board of directors, stating that the directors had come to the determination of allowing the Plaintiff, if he pleased, to forfeit his shares; that, in default of their receiving the arrears, they could of course forfeit the shares without his consent; but in that case he would be entitled, at any time before the shares were actually sold, to redeem them on payment of arrears, &c.; that the directors meant, if he wished a forfeiture, to require him to renounce the right of redemption, and

and to consent to final and complete forfeiture and surrender; that he would then be relieved from further liability; and that if he assented to the proposition, he was to sign a form of consent to abandon the shares. To this the Plaintiff, by letter dated the 13th of the same month of *November*, replied, that he would be happy to have the shares forfeited on the terms proposed.

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On the 24th of the same month, however, the solicitor wrote to the Plaintiff a letter, stating that, on reconsideration of the case, the board were not prepared to make a forfeiture of his shares, and in *January* following the Defendants brought an action against the Plaintiff for the recovery of the arrears. The Plaintiff then filed his bill for a specific performance of the agreement. A motion, now made on behalf of the Plaintiff, for an injunction to restrain the action, was turned into a motion for a decree.

From the evidence it appeared, that the directors had made the offer of forfeiture, in the belief of the Plaintiff's want of means to pay the arrears; but before the final completion of the forfeiture and surrender, they discovered, that on the 9th of *November*, the Plaintiff had allowed himself to be nominated for the office of Mayor of *Barnstaple*, and though unsuccessful, he was afterwards, on the 26th of *December*, 1854, elected Mayor, the office having become vacant by death. On that occasion, in pursuance of the provisions of the Municipal Corporation Act, he made a declaration, that he was seised or possessed of real and personal estate to the amount of 500*l*. The Defendants thereupon insisted on payment of the arrears, and refused to carry into effect the alleged agreement to forfeit.

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Mr. *R. Palmer* and Mr. *Waller*, for the motion, contended that the agreement contained in the letters of the 8th and 13th of *November*, 1854, constituted a binding agreement on the Defendants to declare the fifty shares forfeited, and to release the Plaintiff from all further liability, and consequently that it was inequitable to sue him at law for the arrears. That the contract satisfied the 13th section of the Statute of Frauds (29 Car. 2, c. 3); for it was in writing, and if made between private persons, was binding and capable of being enforced, and therefore though not signed by a committee or by two directors, as provided by the 97th section of the Companies Clauses Consolidation Act (8 Vict. c. 16), but only by their agent, it might be enforced. They cited *The Mines Royal Society v. Magnay* (a).

Mr. *Follett* and Mr. *C. M. Roupell*, for the Defendants. The declaration of forfeiture, even if properly made with notice in writing, is not, until confirmation at a general or special general meeting of the company, any defence to an action for calls; *London and Brighton Railway Company v. Fairclough* (b), and forfeiture is not a substitutional but a cumulative remedy; *Great Northern Railway Company v. Kennedy* (c); an injunction therefore cannot be granted. The alleged contract is not conformable with the requisites of the 97th section of the Companies Clauses Consolidation Act (8 Vict. c. 16); and even if it were so, it is not an agreement of which specific performance can be enforced, for the directors had no power, under the circumstances, to enter into it, or to release any shareholders from payment of calls upon their shares or from the obligations of ownership. The duty

(a) 24 L. J. (Exch.) 7.

(b) 3 Scott, N. R. 68; 2 Man.

& Gr. 674; 2 Railw. Cas. 544.

(c) 6 Railw. Cas. 5; 4 Exch.

417.

of the directors is to sue for and get in the calls upon the shares, but not to arrange with proprietors to release them from obligations in which the other shareholders are interested. There is nothing to take this case out of the ordinary jurisdiction of a Court of Common Law, and bring it into equity. It is a contract to acquire shares of a shareholder for a particular consideration, or to buy the shares at a particular price, the directors had no power so to contract. It would be illegal and nugatory if they purchased them direct, and even if they were surrendered, the shareholder would not be relieved, for the transaction would be *ultra vires*, unless effected in the manner prescribed by the act.

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Mr. R. Palmer, in reply, insisted that the mere declaration of forfeiture was sufficient, and would operate as such, and it was only for the benefit of the shareholder that it was confirmed by a general meeting. He referred to *The Edinburgh, Leith and Newhaven Railway Company v. Hebblewhite(a)*, *The Birmingham, Bristol and Thames Junction Railway Company v. Locke(b)*.

The MASTER of the ROLLS.

I am of opinion that the forfeiture of shares in this case is not a proper subject of contract, but a power and discretion in the directors, who are trustees for the benefit of all the shareholders, which is to be exercised for the benefit of all the shareholders in the company; and it is the duty of the directors to direct a forfeiture when it is for the benefit of all the shareholders, and to refrain from doing so when it is not for their benefit. They are in so doing to make use of all the information attainable

(a) 2 Railw. Cas. 237; 6 Mees. & Wels. 707. (b) 1 Q. R. Rep. 256.

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attainable up to the time when the forfeiture takes place, to guide them in determining whether or not it is for the benefit of the company. The Plaintiff must be taken to have been aware that this was the duty of the directors.

The way I read the letter is this :—The directors say to the Plaintiff, “If we forfeit these shares, will you give up your right to redeem them?” He says, “I will.” They are entitled, on further information which makes them think it is an improper exercise of their discretion, to say, “We will not forfeit on those terms.” It is not an agreement for valuable consideration ; it is a case in which trustees consider it beneficial to modify their power, but before it is carried into effect they get subsequent information, which shows that they cannot properly exercise that discretion in the way proposed, and the Plaintiff cannot compel them to exercise that discretion by a bill for specific performance of forfeiture on those terms.

I am also of opinion that I cannot mix these two acts of parliament together, so as to make this clause 68 of the first act affected by the Companies Clauses Consolidation Act, where it is beneficial to the Plaintiff, but the contrary where it is injurious to him. I am satisfied that I must take one act or the other. If I take the first act, there was no forfeiture until confirmed by the general meeting ; on the second act, whether that be so or not, an action may still be brought for the calls due.

I do not pursue the consideration of this case any further, because I think that it is not one for the exercise = of the jurisdiction of the Court.

Dismiss the bill without costs.

1855.

MORLAND v. ISAAC.

IN *April* and *May*, 1850, the Defendant, an army-contractor and outfitter, supplied goods on credit to Lieutenant *Walker*, who was then about to go abroad. On the 4th of *June*, the Defendant delivered him a signed account, and on the 10th of *June*, the Defendant, with *Walker's* knowledge, who attended at the Insurance Office for that purpose, effected a policy on the life of *Walker* for 500*l.* in the Defendant's own name. In the account delivered one of the items debited was this:—"1850, *May* 13, Sum paid for insurance, 14*l.* 6*s.* 8*d.*" *Walker* was debited therein with twelve months' interest, making together the sum of 169*l.* 19*s.* 8*d.*, and he was credited with a draft for 169*l.* 19*s.* 8*d.*, payable twelve months after date.

April 26.

A tradesman insured the life of his debtor, in his own name; he charged the debtor with the premiums, but they were never paid by him. On the death of the debtor, the Court held, that his representatives were entitled to the produce of the policy after payment of the debt and premiums.

There is a distinction between a policy effected to secure a debt and one to secure an annuity.

Soon after, *Walker* went to *Canada*. Two letters were written to him there by the Defendant. The first, dated 25th *April*, 1851, was as follows:—"Sir, We regret to be under the necessity of again addressing you upon the subject of *our account*, but we cannot allow it to remain without coming to some kind of arrangement in the matter; unless, therefore, some satisfactory settlement is made immediately, more especially with regard to your *overdue acceptance*, we shall have no other resource but to lay the whole case before the Master-General of the Ordnance, and leave the matter to his adjudication." The second letter, dated 10th *November*, 1851, was as follows:—"Dear Sir, Many months having passed since you embarked, and as we have

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have made repeated applications without receiving from you an answer, we apply again and ask you to pay your *dishonoured draft, as also the sum paid for your insurance*. It is our intention, should you fail to reply to this, to place the matter in other hands. With reference to your account this is considerably overdue," &c.

Walker died in *Canada*, in *March*, 1852, without having discharged the debt. The Defendant *Isaac* received the 500*l.* on the policy, and claimed the whole, on the ground that it had been effected by himself and for his own benefit. The Defendant denied that any express agreement had ever been made between him and *Walker*, either as to the amount to be insured (which was to be entirely at the Defendant's discretion), or the ownership of the policy, or payment of the premiums; but it was clearly understood by the Defendant, and, he believed, also by *Walker*, that the policy was the Defendant's, and with respect to the payment of the premiums, that it should, in the first instance, be made by the Defendant and it was fully understood, that the moneys assured by the policy should remain the Defendant's own absolute property. The Defendant's understanding and intention was, as he alleged, that if *Walker* should, in his lifetime, pay off the debt and premiums and expenses of insurance, he should be at liberty to do so, and in that case, the Defendant would either have dropped the insurance or transferred the policy to *Walker*. He also stated, that the entry in the account of the item of 14*l.* 6*s.* 8*d.* for insurance was a mistake.

Mr. *Bright*, in the absence of Mr. *R. Palmer*, for the Plaintiff, argued, that the claim advanced by the Defendant to be entitled to the produce of the policy for his own benefit, was quite inconsistent with the facts,
 and

and the accounts and letters of the Defendant himself, in which he had treated *Walker* as liable to pay the amount of the premiums. That if such were the case, the policy was a mere security for the debt, and that the Plaintiff was entitled to the balance of the produce of the policy after discharging the debt. Secondly, he argued, that the documents evidenced a constructive trust; *Forster v. Hale* (a). He also referred to *Lea v. Hinton* (b), which he stated had been affirmed.

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Mr. Roupell and Mr. Haddan, for the Defendant. *Prima facie* a policy effected by A. in his own name, on B.'s life, belongs to A., and the mere proof that some of the premiums were paid by B. does not rebut the presumption; *Triston v. Hardey* (c). To establish an ownership in *Walker* a contract must be proved that he would pay, and an obligation on him to keep up the insurance. No such contract is proved, and its existence is positively denied by the Defendant. It is true, that the premium was charged in the account, but it was never paid, and nothing was done by *Walker* to recognize the payment on his behalf, or to render himself bound to keep up the policy. The first charge is sworn to have been made by mistake, and the other was never assented to. The policy was not effected in pursuance of any contract, and, unless the Plaintiff establishes some subsequent contract which proves the ownership to have been in *Walker*, he has no right to any part of the produce of the policy on paying off the debt; *Gottlieb v. Cranch* (d). The attendance of *Walker* at the insurance office proves nothing; it was a mere compliance with one of the requirements necessary to effect any policy. The Defendant might have dropped or continued

(a) 3 Ves. 696; 5 Ves. 308.
(b) 19 Beav. 324.

(c) 14 Beav. 232.
(d) 4 De G. M. & G. 440.

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tinued the policy at his pleasure, and the legal ownership of the policy remains in the Defendant unaffected by any trust. They cited *Burridge v. Row* (a); *Godsall v. Boldero* (b).

The MASTER of the ROLLS.

I think the Plaintiff is entitled to a decree. It has been justly observed, during the argument, that this matter depends on the contract between the parties. This, however, may either be expressed in writing or by parol, or it may be inferred from the acts and dealings between the parties, from which a contract between them may appear.

There is a distinction between an assurance to secure a debt and one to secure the payment of an annuity. In the case of an annuity the grantee is at liberty to effect an insurance or not; it is a distinct contract which diminishes his profits to the extent of the premiums, the amount of which the grantee cannot recover from the grantor. Thus, if the grantee of an annuity of 100*l.* a year pays 5*l.* a year for insurance, he cannot charge it against the grantor, but it must come out of his own pocket. The object of an insurance, in the case of an annuity, is to indemnify the grantee against the premature death of the grantor, and in such a case, it requires strong facts to bring one to the conclusion, that it was incumbent on the grantee to keep it on foot and to assign the policy to the grantor upon his redeeming the annuity.

The

- (a) 1 *Younge & C. (C. C.)* Life Assurance Company, 24 *L. J., C. P.*, 2, and *Law v. The London Indisputable Life Policy Company*, 1 *Kay & Johnson*, 223.
 183.
 (b) 9 *East*, 72, reversed by *Dalby v. The India and London*

The case is different where a creditor insures the life of his debtor. If the creditor pays the premium out of his own pocket, the case is analogous to that of the annuitant; but if he makes the debtor pay them the case is perfectly different.

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The Plaintiff stands in the same situation in which *Walker* would stand if he were now alive and came forward and said, "I am willing to pay you the amount of the bill and all premiums on the policy, and I require you to assign it to me." The case of the Defendant is, that the understanding was, that he should be at liberty to do so, and in that case the Defendant would either have dropped the insurance or transferred the policy to *Walker*. Now, that is exactly what the Plaintiff is asking in this case. He says, "I will pay the total amount of the bill and of the premiums, and I ask you to transfer the produce of the policy to me." Neither *Walker*, nor the Plaintiff, would be entitled to this, unless there had been that which amounted to an understanding and agreement between the Defendant and *Walker*, that *Walker* should pay the premiums, for if not, the creditor would have taken on himself the risk, and might say to the debtor, "You have nothing to do with the policy."

What are the facts of this case? The Defendant tells *Walker* he will insure his life, and he gets him to attend at the insurance office. *Walker*, therefore, had knowledge that the policy was effected. An account is delivered at the time, in which *Walker* is charged with "the sum paid for insurance." In *November*, 1851, a letter is written by the Defendant to *Walker*, requiring payment "of your dishonoured draft, as also the sum paid for your insurance." This evidently refers to the second premium on the policy, for the letter proceeds,
 " with

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"with reference to your account, this is considerably overdue." It therefore refers to the account previously sent, which contains the item for the first premium. I hold it clear, therefore, that this letter refers to the second premium.

If *Walker* had been sued, could he have successfully resisted paying the premiums? The answer would be, "You knew the policy was to be effected; you attended the office; the account was delivered to you, in which the payment was charged; you made no complaint, and did not say you were not liable: a second account was sent, and again you made no complaint." How, after all this, could he say he was not liable? If, then, he was bound to pay the premiums, is he not entitled to have the produce of those payments? According to the Defendant's contention, if this matter had gone on for twenty years, and the Defendant had charged *Walker* with all the payments, he might now refuse to assign over the policy. The Defendant would, I think, have had a right to deduct the amount of his bill, and the amount paid for the insurance, but the balance would belong to *Walker*.

The Plaintiff stands exactly in the same situation as *Walker*. This policy was a security for the debt and the premiums, and I am therefore of opinion, that, on payment of all that is due to the Defendant, the Plaintiff is entitled to the balance.

The Defendant must pay the costs of suit.

NOTE.—See *Henson v. Blackwell*, 4 Hare, 434; *Brown v. Freeman*, 4 De Gex & S. 444; and *Ex parte Lancaster*, *ibid.* 524.

1855.

HUGHES v. KEY, his Wife and ADDISON.

IN 1839, on the marriage of Mr. and Mrs. *Key*, a sum of 1,000*l.*, to which she was entitled, under the will of her father, was assigned to *Hughes* and *Addison*, on trust for Mr. and Mrs. *Key*, for their lives, and afterwards for their children. The money was secured by the bond of Lord *T.*, which was paid off in 1844, and the amount received by Mr. *Key*, and by him lent to his brother.

There were seven children of the marriage. *Addison* having refused to concur with the Plaintiff in compelling repayment of the money, the Plaintiff filed this bill against Mr. and Mrs. *Key* and *Addison* alone, alleging some concurrence by *Addison* in the payment of the money to *Key*, and praying that Mr. *Key* might be ordered to pay the amount.

Mr. *R. Palmer* and Mr. *Rudall*, for the Plaintiff. The Plaintiff had no knowledge whatever of the transaction until a considerable time after, when he was informed of it by Mrs. *Key*. He is not, therefore, primarily liable for the breach of trust, though he would become responsible, if he neglected to take the necessary steps to compel the restoration of the trust fund, consequently it was necessary for him to file the bill.

Mr. *Hoare*, for the Defendants. Every party to a breach of trust is primarily liable, and there ought to be a decree against all. The brother of Mr. *Key*, in whose hands the money now remains, is not a party to the

April 20.
A trust fund settled on husband, wife and children in succession, was received by the husband, and lent by him to his brother. A bill by one trustee against the other trustee, the husband and wife, and omitting the brother and children, held sustainable, and a decree was made against the husband, reserving all rights against the brother and the trustees. The co-trustee, who had not joined as co-plaintiff, refused his costs.

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the suit, as he ought to have been. *Addison* has received nothing; he is culpable in the same degree as the Plaintiff. He ought to have his costs.

The MASTER of the ROLLS.

This, as regards the Defendant *James Key*, is a very simple case, though, unfortunately, one of very frequent occurrence.

Here, a sum of 1,000*l.*, payable to a lady under the will of her father, is, by her marriage settlement, settled on certain trusts, to the benefit of herself for life, and then of her husband for life, and afterwards of the children of the marriage. It was the duty, no doubt, of the trustees, to call in that money, and when paid, to have invested it on the trusts of the settlement. The executors of the father of the lady unfortunately pay it directly to the husband, who lends it to his brother, and this suit is instituted by one of the trustees of the marriage settlement, to compel the husband to repay that sum of money. It is a mere matter of course to direct him to repay it.

If no application had been made to him before the filing of the bill, and he had always been ready to pay it, then this Court, although it would undoubtedly have compelled him to pay the money, would have paused before it directed him to pay the costs of the suit. But the very opposite is the case. Here he is told that the suit will be absolutely necessary, unless he repays the money, and an application will be made to the Court of Chancery against him. He does not choose to pay it, but he makes a suit for replacing the fund for the benefit of the *cestuis que trust* necessary. I therefore entertain no doubt that this Court must make a decree against

against him, not only to replace the money, but also to pay the costs of the suit.

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With respect to *Addison* and the Plaintiff, I do not now propose to make a decree, because I do not know what may be the result of the proceeding. I assume that *James Key* will pay the money, and that no question will arise as to the trustees. There is no case now to fix the Plaintiff, but the decree I make in this case will not affect or exonerate him, if he be liable to his *cestuis que trust* in respect of this transaction. If *James Key* should not repay the money the plaintiff's liability will remain undischarged, and the seven children of the marriage, who are all infants, may, at any time, file a bill to compel him to repay the money, assuming him to be liable, as to which I do not intimate any opinion.

I do not intend to decide any matter hypothetically, without seeing what the result may be. Therefore I suspend all expressions of opinion on that subject, but will give liberty to apply as the case may occur. I now direct the money to be paid into Court, and reinvested on the trusts of the settlement.

I cannot give Mr. *Addison* his costs, because, on his own allegation, he is an innocent trustee; and if so, it was clearly his duty to have joined the Plaintiff in compelling the restoration of this money for the benefit of their *cestuis que trust*. I never allow an estate to be burdened with more than one set of costs, by the severance of two trustees, even if they appear as Defendants, unless there is some very special reason for their so doing. If I gave him his costs, *James Key* would in fact have to pay them, because I should allow the Plaintiff to add them to his own, and have them over against *James Key*. In my opinion, Mr. *Addison* ought to

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 and Others.

to have joined as co-Plaintiff, for the purpose of having the sum of money replaced by the husband, who in fact received it.

NOTE.—See *Franco v. Franco*, 3 Ves. 75; *Greenwood v. Wakeford*, 1 Beav. 576; *May v. Selby*, 1 Younge & C. (C. C.) 235.

LEWIS v. DUNCOMBE.

April 19.

In a mortgage suit by a judgment creditor of a tenant in tail in possession, the latter was ordered to execute a disentailing deed, in order to give full effect to the plaintiff's charge.

IN 1844, the Plaintiff obtained a judgment against *Duncombe*, who was now tenant in tail in possession of some real estate, and this bill was filed by the Plaintiff to realize his charge on the property.

Mr. *R. Palmer*, for the Plaintiff, asked that the tenant in tail might be ordered to execute a disentailing deed under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), observing that the 1 & 2 Vict. c. 110, s. 13, made the judgment a charge on the land as against the issue in tail and the subsequent remainderman, still that, in the event of the Defendant's death, they would not be wholly barred, except by the execution of such a deed.

Mr. *Duncombe* did not appear.

Mr. *Stevens*, for prior incumbrancers.

Mr. *J. V. Prior*, for a disclaiming Defendant.

Mr. *Southgate* said, his impression was that a disentailing deed had already been executed.

The MASTER of the ROLLS. Let the Defendant execute a disentailing deed, if none has already been executed.

1855.

SULLIVAN v. BEVAN.

April 21, 23.

AN order was made for the administration of the estate of the intestate, upon the application of a simple contract creditor. The estate was greatly insolvent, and the amount due from the administratrix was only 169*l*. It was now supposed that this sum would be insufficient to pay the only specialty debt which had been proved and the costs of the administratrix. Pending the proceedings, notice was given to the Plaintiff of the state of the assets and of the claims of the specialty creditor, but he continued the prosecution of the order, and under it the specialty creditor came in and proved.

A simple contract creditor obtained an order to administer the intestate's estate. He afterwards had notice that the estate was insufficient to pay the specialty creditor and the costs of the administratrix, but he still persisted in prosecuting the suit. Held, that the fund must be applied, first, in paying the costs of the administratrix, then in paying the Plaintiff's costs down to the notice, and the residue in payment of the specialty creditor.

The case now came on upon the certificate of the Chief Clerk.

Mr. *Sheffield*, for the Plaintiff, argued, that his costs ought to be paid in priority of the debt of the specialty creditor, who had come in and taken the benefit of the suit. He cited *Larkins v. Paxton* (a); *Barker v. Wardle* (b).

Mr. *Speed*, for the Defendant, argued, that the Plaintiff, a simple contract creditor, could take nothing until the debt of the specialty creditor, who had priority over him, had been provided for. He cited *Bluett v. Jessop* (c).

The MASTER of the ROLLS.

In this case, the Plaintiff, before he prosecuted the order,

(a) 2 *Myl. & K.* 320. (b) 2 *Myl. & K.* 818. (c) *Jacob*, 240.



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 ~~~~~  
 SULLIVAN  
 v.  
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order, was informed what the state of the assets was and the claims of the specialty creditor; and he prosecuted it subsequently at his own peril. No doubt, in this case, the administratrix must be paid her costs in the first instance, then the Plaintiff his costs up to the notice, the specialty creditor is then entitled to be paid his debt, and the residue, if any, will be divided among the simple contract creditors.

### BAYNE v. CROWTHER.

*April 26.*  
 Bequest for  
 "maintenance" of a  
 child, held not  
 to cease on his  
 death, but to  
 pass to his re-  
 presentative.  
 Bequest of  
 leaseholds, in  
 trust to pay  
 half of the  
 rents to *A.* for  
 life, and the  
 other half to  
*B.* for life, and  
 in case of the  
 death of either,  
 his share of  
 the rents "to  
 be paid and  
 applied for the  
 maintenance  
 of his child-  
 ren," until the  
 decease of the  
 survivor of *A.*  
 and *B.*, and  
 then to sell  
 and divide  
 equally be-  
 tween the children of *A.* and *B.* After the death of *A.*, one of his children died  
 Held, that his representative was entitled to a share in the rents until the death of *B.*

THE testatrix bequeathed a leasehold house to her executor, upon the following trusts:—"As to one moiety of the rents and profits thereof, in trust to pay the same to my niece, *Martha Savage*, for her life, and as to the other moiety of the said rents and profits, in trust to pay the same to my nephew, *William Crowther* for life; and in the event of the decease of either of them, my said nephew or niece, the share of the said rents of him or her so dying *to be paid and applied for the maintenance* of his or her children or child, until the decease of the survivor of my said nephew or niece and after the decease of the survivor of them, then upon trust, that my said trustee "do sell the house and premises, and do and shall pay the money arising therefrom, equally, between the children of my said nephew and niece for their absolute use and benefit."

In a subsequent part of his will, he gave a legacy to  
*William*

*William Crowther* for life, and after his decease between his two children by name, viz. to *Charles James* and *Cordelia Crowther*.

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BAYNE  
v.  
CROWTHER.

The testatrix died in 1842, *Cordelia Crowther* attained twenty-one and married, and she died in 1850. Her father, *William Crowther*, died in 1854, and *Martha Savage* and *Charles James Crowther* were still living. In this suit, the legal personal representative of *Cordelia*, claimed one half of a moiety of the rents of the leasehold during the life of *Martha Savage*.

Mr. G. L. Russell, for the Plaintiffs.

Mr. Hallett, for *Charles James Crowther*.

Mr. Ware, for the representative of *Cordelia*, cited *Webb v. Kelly* (a), and *Lewes v. Lewes* (b).

Mr. Hallett, in reply.

The MASTER of the ROLLS.

I think this was a vested interest in the two children. The difficulty arises on the word "maintenance;" but there is no direction that it should cease when the minority ceased. The rents of the leaseholds are to be "paid and applied for the maintenance" of the children; that is, to be applied for their benefit while infants, and to be paid to them if adult; the fact, therefore, of one dying does not prevent his legal personal representative taking the benefit of the bequest. Mr. Ware's argument is, that if both died there would be no intestacy, and why should the result be different if one only died? Why should there be an intestacy in one case and not in the other?

I am

(a) 9 Sim. 469.

(b) 16 Sim. 266.

1855.  
 ~~~~~  
 BAYNE
 v.
 CROWTHER.

I am of opinion, that the children took vested interests, and that the legal personal representative of *Cordelia* is now entitled to one half of the rents which were given to her father, *William Crowther*, for life.

BIDDULPH v. Lord CAMOYS.

April 30.

A witness, examined under a bill to perpetuate testimony, was very old, and unable, through illness, to leave his home without danger; another was resident in *Canada*. Their depositions were ordered to be published, and produced at the trial, about to take place, and that either party might make such use of them "as by law they can."

ANOTHER motion was made in this cause, for the publication of the depositions of witnesses taken in a suit to perpetuate testimony, in order that they might be used on a trial of an ejectment at the next assizes. Amongst them, it was asked that those of *John Hammond* might be published, as to whom the Court, on the former occasion (a), considered the evidence insufficient.

There was now the additional evidence of the medical attendant of *John Hammond*, who stated, that *Hammond* had told him and he believed it to be true, that he was in the eighty-fifth year of his age. The witness then stated as follows:—"He is almost stone blind; he has not left his house for the last three years; he has, at intervals, during the last three months, been confined from ill health to his bedroom, and he has, during such last-mentioned period, been obliged, for the same reason, to keep his bed for seven weeks together. He is now suffering from such extreme general debility, and his general bodily infirmity is such, that it would be highly dangerous for him to attempt to leave home for the present, nor do I believe he will, under any circumstances, be able to do so without danger

(a) 19 *Beav.* 467.

danger to his health, for the next six months, at the least."

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It was also asked, that the depositions of another witness, *Margaret Llewellyn*, might be published. She was resident in *Canada*, and her sister deposed, "that it was not likely that she would return to *England*, but if she should return at all, it would certainly not be for many years to come."

Mr. R. Palmer and *Mr. Bagshawe*, for the Plaintiff, in support of the motion. The case of *Hammond* is governed by *Morrison v. Arnold* (a), he being incapable of travelling. *Llewellyn* is abroad and likely to remain there, and cannot be compelled to come and be examined *vivâ voce* at the trial. It is therefore right that her depositions should also be published. *Barnsdale v. Lowe* (b) was also referred to.

Mr. Roupell and *Mr. Fleming*, *contrâ*, for Lord Camoys, argued, that the depositions in question ought not to be published, as the Plaintiff had now the power of examining the witnesses openly, under a commission issued by the Common Law Court by virtue of the statute (c), and that it was only in the event of the impossibility of a witness being examined openly, that this Court would permit depositions taken secretly to be published and used.

Mr. Ellison, for assignees.

The

(a) 19 Ves. 669.

(b) 2 Russ. & Myl. 142.

(c) 1 Will. 4, c. 22. See 1 Chit. Statutes, 1120.

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I am of opinion that the Plaintiff is entitled to the order, and that the case comes within the rule of the authorities cited. You cannot have the benefit of the evidence given in a suit to perpetuate testimony, if you can get the witness examined *viva voce*; but if a witness cannot travel without danger to his health, he cannot give his evidence in open Court; he is prevented from attending.

The statute referred to does not take away the jurisdiction which the Court always exercised, in suits to perpetuate testimony, before the statute passed. I do not, therefore, consider it any reason why, when testimony has been taken, the Plaintiff should not have an order to publish it. I am of opinion, that the Plaintiff is entitled to the order.

 ABSTRACT OF ORDER.

Order publication, and that the proper officer attend with the record and deposition, and that either of the parties may make such use of them "as by law they can."

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March 7, 8.
April 26.

BY this bill, the Plaintiff, Mr. *Davis*, sought simply to compel the Defendant, the Earl of *Dysart*, to produce the deeds and documents relating to his estates. The Plaintiff insisted, that these estates stood limited to the Earl for life, with remainder to his son Lord *Huntingtower*, and that Lord *Huntingtower* had, by deed of the 18th of *November*, 1841, mortgaged these estates to him, the Plaintiff.

Any remainderman whose estate is vested may maintain a bill against the tenant for life, for the sole purpose of production and inspection of the muniments of title. If the tenant for life suggests that the purpose for which production is required is improper, the onus is on him to shew it.

In the argument, the estates were divided into three classes, and were very conveniently distinguished as "*the Earl Lionel's estates*," "*the Earl Wilbraham's estates*," and "*Sir William Tollemache's estates*."

This right, however, only exists when the title of the remainderman is undisputed; for, if there be a reasonable cause for litigating his title, he cannot compel production.

The Defendant contended, that the interest of Lord *Huntingtower* in the first estates had been barred by a prior tenant in tail; that Lord *Huntingtower's* interest in the second estates had been forfeited by a non-compliance with a condition, but he did not dispute Lord *Huntingtower's* title to the third class of estates. In setting out the title to these estates, it is proposed to omit all the facts and limitations not bearing on the question, and it will be convenient, in the first place, to refer to the state of the family.

The mortgagee of *A.* (an alleged remainderman) instituted a suit against *B.* (the alleged tenant for life) for the mere production of the title deeds.

Lionel, Earl *Dysart*, died in 1799, and was succeeded by

B. set up a *bonâ fide* objection, that *A.'s* estate had become forfeited, and also that by the terms of the mortgage deed, the estates in question were not comprised therein. The assignees of *A.*, (who had become bankrupt,) though interested in the latter question, were not parties to the suit. The Court declined adjudicating, incidentally, on the Plaintiff's right, and dismissed the bill with costs.

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by *Wilbraham*, Earl *Dysart*, on whose death, in 1821 ~~\_\_\_\_\_~~, his daughter Lady *Louisa* became Countess *Dysart* ~~\_\_\_\_\_~~, and she died in 1840. She had a son, Sir *William Tollemache*, who predeceased her, having died in 1833, and he ~~\_\_\_\_\_~~ left a son, the Defendant Earl *Dysart*, whose eldest son ~~\_\_\_\_\_~~ was Lord *Huntingtower*, and the Plaintiff was his mort-~~\_\_\_\_\_~~-tgagee.

The title to the first or *Lionel* estates was as follows — Earl *Lionel*, by his will, had (subject to prior estates, to which it is unnecessary to refer) devised one-third of the *Lionel* estates to Lady *Louisa* for life, with remainder to Sir *William Tollemache* in tail male.

As to the *Wilbraham* estates, it appeared that by a deed of the 3rd of *December*, 1804, *Wilbraham*, Earl *Dysart*, had settled part of them (including a second third share of the *Lionel* estates) on Sir *William Tollemache* for life, with remainder to the Defendant Earl *Dysart* for life, with remainder to Lord *Huntingtower* in tail, with remainder over to the *Halliday* family. But these limitations were subject to a condition, whereby it was provided and declared, that the limitations in favour of Sir *William Tollemache*, &c., *J. R. D. Halliday*, &c., and their respective issue male, were upon this express condition, that if they, or any of them, or their or any of their issue male, should, under the limitations contained in the will of Earl *Lionel*, or otherwise, become seised of or entitled to "the other shares of the *Lionel* estate, for an estate of inheritance in fee or in tail," then and in that case Sir *William Tollemache* and the other persons and their respective issue male should, within twelve calendar months after being so severally seised, execute such deeds as Mr. *Greville* and Mr. *Butler* (the two trustees of the deed), or the survivor, or the executors or administrators of such survivor, should judge necessary,

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sary, proper or expedient, for limiting, settling and assuring the estates "to the uses and upon the trusts thereinbefore mentioned, to the end and intent and so that the entirety of the said manors and hereditaments might go in the same manner, together, upon the trusts before mentioned." And that if the said Sir *William Tolle-mache, &c.*, *J. R. D. Halliday, &c.*, or any of them, or their or any of their issue, should refuse or neglect to execute, &c. such act, deed, &c., as aforesaid, within twelve calendar months, "then and in such case, the uses or estates thereinbefore limited to or for the benefit or in favour of the person, who or whose issue male should so refuse or neglect as aforesaid, should absolutely cease and be void, in such and the same manner as if he or they respectively were dead without issue of his or their body or bodies, entitled or inheritable under the limitations thereinbefore contained."

This clause, probably, from the omission of a few words, did not create any forfeiture of the estate of the issue of the persons who should neglect to execute such deed.

By his will, executed the next day (the 4th of *December*, 1804), Earl *Wilbraham* devised other estates in strict settlement, subject to the declaration following:— And he thereby declared, that every person to whom he had devised the property, who had or thereafter should have any estate or interest in the hereditaments devised by Earl *Lionel*, should respectively make, execute, &c., all such deeds, &c. whatsoever, as the said *R. F. Greville* and *C. Butler*, and the survivor of them, and the executors, &c., should judge necessary, &c., for settling, &c., the same respectively, to the uses, &c., to which the same were respectively limited by the deed of 1804, and by that his will; and that if any such persons

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persons should refuse or neglect to do so, the uses, devises, &c., thereby expressed in favour of the person or persons so refusing or neglecting, or his or their issue, or limited, created or devised to and for the benefit or in favour of him or them, by virtue of that present clause, or for his, her and their issue respectively, should absolutely cease, determine and be void, to all intents, constructions and purposes whatsoever, in the same manner as if such person or persons respectively had died without issue in his lifetime. And he declared, that if any one to whom an estate tail was given, should be living at his decease, he should take only for life.

Sir *William Tollemache* never came into possession of the first third of the "*Earl Lionel estates*," but in 1811, and in the life of his mother, he levied a fine and obtained a base fee. The Defendant the Earl of *Dysart* came into possession of the "*Earl Lionel estates*" in 1840, and in 1842 he executed a disentailing deed, and thereby acquired the fee in them. Neither Sir *William Tollemache* nor the Defendant had ever resettled the *Lionel* estates, pursuant to the conditions prescribed by the deed and will of 1804, but the *Halliday* family had complied with the condition, as regarded the property devised to them.

In 1843, *John Tollemache*, the representative of the *Halliday* family claimed the estates comprised in the deed and will of 1804, and which had been settled, successively, on Sir *William Tollemache*, the Defendant Earl *Dysart* and Lord *Huntingtower*, on the ground that they had become forfeited by the non-compliance with the condition. The Defendant thereupon bought up the claimant's interest for 15,000*l*.

The third or "the *Tollemache estates*," which had

been devised by the will of Sir *William Tollemache*, it was admitted, stood limited to the Defendant the Earl *Dysart* for life, with remainder to Lord *Huntingtower* for life.

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By indenture, dated 18th of *November*, 1841, and made between Lord *Huntingtower* of the one part, and the Plaintiff *Moss Davis* of the other part, reciting the will and death of Sir *William Tollemache*, and that his widow and the Defendant, his son, were living, and reciting a judgment entered up by the Plaintiff against Lord *Huntingtower* for 7,210*l.* 14*s.*, and that the Plaintiff had agreed to advance to Lord *Huntingtower* the sum of 500*l.*, upon having the same with interest secured, and also the 7,210*l.* 14*s.* and interest further secured as thereafter expressed; Lord *Huntingtower* granted, &c. to the Plaintiff, his heirs and assigns, all the manors, lands, hereditaments and premises comprised in the residuary devise, contained in the will of Sir *William Tollemache*, and all the hereditaments then or thereafter to be purchased under the trusts contained in such will. "And also all and singular other the freehold manors, messuages, farms, lands, tenements, hereditaments and premises, whatsoever and wheresoever, of or to which the said Lord *Huntingtower* was seised or entitled, in possession, reversion, remainder or expectancy, or otherwise, either under or by virtue of the said recited will, or otherwise howsoever," to hold the same to *Moss Davis*, his heirs and assigns, subject to redemption. And Lord *Huntingtower* covenanted to surrender all the copyholds comprised in the will of *William Tollemache*, and also those to be purchased thereunder, and also all other the copyhold or customary messuages, farms, lands, tenements, hereditaments and premises whatsoever and wheresoever, of or to which Lord *Huntingtower* was seised or entitled, in possession, remainder,

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remainder, reversion or expectancy, or otherwise, either under or by virtue of the said will or otherwise howsoever."

In *June*, 1842, the Plaintiff filed a bill for an account of what was due on the mortgage security, and to obtain a sale of the interest of Lord *Huntingtower* in the *Tollemache* estates. In 1845, a decree was made which was confined to that estate, but between the filing of the bill and the hearing of the cause, Lord *Huntingtower* was duly adjudged a bankrupt, and assignees of his estate were appointed.

On the 18th of *November*, 1846, the Master made his report, finding the amount due on the mortgage to be 8,334*l.* 4*s.* 11*d.* On the 23rd of *February*, 1847, the cause came on to be heard on further directions, when a decretal order was made, not confined to "*the Tollemache estates*," but directing a sale of the interest of Lord *Huntingtower*, in all and singular the real and personal estate comprised in or subject to the indenture of mortgage of the 18th of *November*, 1841. This, the Plaintiff alleged, included not merely "*the Tollemache estate*," but, under the general words in the mortgage deed, "*the Earl Lionel and the Earl Wilbraham estates*," but finding it impracticable to prosecute the order made on further directions, without access to the title deeds, &c., which were in the Defendant's possession, he filed this bill against the Earl of *Dysart*, to compel production and inspection, and for no other purpose.

The Defendant admitted he was only tenant for life of the *Tollemache* estate, and said he had offered to produce the deeds relating to it; but he claimed, by his answer, to be absolutely entitled to the other two

estates, and denied that Lord *Huntingtower* had any right to or interest in them, and he refused production of the title deeds relating to them.

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The cause now came on to be heard upon motion for a decree.

Mr. *R. Palmer* and Mr. *Jessel*, for the Plaintiff. The Defendant, as tenant for life of the estates, is bound to produce the title deeds to the persons entitled in remainder. The authorities are distinct on the subject. The Defendant, at one time, was only tenant for life of the two estates in question, but he now insists that he has become absolutely entitled to them, by reason of their forfeiture and the subsequent conveyance to him. In the first place, there was no forfeiture, for, upon the terms of the proviso, the parties were only bound to execute such deeds as the trustees should judge necessary, proper and expedient. They never adjudged any deed to be necessary, proper or expedient, nor called for the execution, by the devisees, of any deed; there has, therefore, been no default or forfeiture. Besides this, by the terms of the deed of 1804, the life estate only, and not the estate of the issue, was to be forfeited, in case of the tenants for life not complying with the condition. Secondly, but if a forfeiture was committed, the effect of the purchase from *John Tollemache*, and of the conveyance to the Defendant, also operated as a forfeiture of *John Tollemache's* interest, because the property was not conveyed, as it ought, to the uses of the deed and will of 1804, and the interest, therefore, of Lord *Huntingtower* was not affected. Thirdly, assuming that a forfeiture took place, then *John Tollemache* had nothing but a mere right of entry to convey, which could not (prior to the statute 8 & 9 Vict. c. 106) be conveyed by deed; the conveyance to the Defendant

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Defendant operated merely as a release of that right of entry, and enured to the benefit of all parties interested in the estate, except the party conveying, and therefore simply extinguished the right, if any, under the forfeiture. Fourthly, a tenant for life purchasing up such a right or interest, becomes a trustee for all parties interested. They remarked on the inadequacy of the consideration paid by the Defendant for the estates, and cited Lord *Lempster* v. Lord *Pomfret* (a); *Ivie* v. *Ivie* (b); *Noel* v. *Ward* (c); *Brigstocke* v. *Mansel* (d); *Smith* v. *Cooke* (e); *Pyncent* v. *Pyncent* (f); *Reeves* v. *Reeves* (g); 1 *Sug. V. & P.* (h).

Mr. *Lloyd* and Mr. *Tripp*, for the Defendant. A tenant for life is entitled to the sole custody of the title deeds so long as his estate endures, and a bill against him for their mere production, and seeking no ulterior relief, cannot be maintained. At any rate, the production is a matter of discretion, and the tenant for life is bound to shew, that the purpose for which the production is sought is proper.

A forfeiture clearly took place by reason of the non-compliance with the proviso, and the Defendant became a purchaser of the forfeited interest for valuable consideration, from the party in whom that interest became vested. The amount of the consideration paid by the Defendant is immaterial, the case standing exactly on the same footing as if *John Tollemache* were a Defendant and himself contested the Plaintiff's right. The Plaintiff's mortgage does not in fact include, nor was it intended to include the property in question; its operation

(a) 1 *Ambl.* 154; 1 *Dick.* 238.

(b) 1 *Atk.* 429.

(c) 1 *Madd.* 322.

(d) 3 *Madd.* 47.

(e) 3 *Atk.* 382.

(f) 3 *Atk.* 571.

(g) 9 *Mod.* 132.

(h) Page 469 (11th edit.).

ration is confined to the property described in the deed, and the general words will not be construed to include estates not in the contemplation of the parties.

They cited *Iverson v. Gassiot* (a); *Pope v. Whitcombe* (b); *Watkins, Convey.* (c); and see *Walsh v. Trevanion* (d).

The MASTER of the ROLLS reserved judgment.

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This is a suit instituted by the Plaintiff to compel the Defendant to produce deeds and documents relating to certain estates of which the Defendant is possessed as tenant for life, and in which the Plaintiff claims an interest, by virtue of a mortgage deed of the 18th of November, 1841, executed by Lord *Huntingtower*, the son of the Defendant, in favour of the Plaintiff.

The bill prays no further or ulterior relief; it is simply a suit to obtain the production of the deeds and documents possessed by the Defendant, relating to certain estates of which he is the tenant for life, at the instance of a person who claims to be mortgagee of the reversion of these estates, and who requires their production, in order to enable him to make his mortgage security available, by sale of the interest thereby conveyed to him. Although the suit is of so simple a nature, the questions to which it has given rise are of a very different character.

The first and preliminary question is, whether, admitting

(a) 3 *De Ger. M. & G.* 958.  
(b) 3 *Russ.* 124.

(c) Page 317 (*White's* edit.).  
(d) 15 *Q. B.* 734.



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mitting his title, the mortgagee of a reversion is entitled to compel the tenant for life in possession to produce the title deeds relating to the estate; in other words, whether the reversioner is so entitled, for the purpose of enabling him to dispose of or deal with his property in such a manner as he may think fit. It is not disputed that the tenant for life is entitled to have the custody of the deeds and documents relating to the estate, but it is contended, that a person interested in the same lands, under the same settlement, may deal with his interest therein as he may think fit, and that for this purpose, he may compel this production, by any one who has the custody of the documents. The Defendant, on the other hand, contends, that this discovery and production is limited to cases where it is sought as ancillary to some ulterior relief, and that a bill confined to the mere purpose of production and inspection is a novel experiment, unsupported by authority, and one which ought to be discouraged by the Court.

On this question, I am of opinion, that any person entitled to a vested remainder in an estate may maintain a bill against the tenant for life, for the sole purpose of production and inspection of the title deeds and documents relating to the estate, in the possession of the tenant for life, in order to enable the remainderman to deal with his property as he may consider most for his advantage. I think it unnecessary to go through the various authorities that were cited and commented upon before me on this subject, they all tend in the same direction; and although, in some cases, as in that of Lord *Lempster* v. Lord *Pomfret* (a), they intimate, that the ordering of this production is not a matter of right, but rests on the discretion of the Court, and that

it

(a) 1 *Ambl.* 154; 1 *Dickens*, 238.

it will not be directed, unless for a purpose which the Court shall deem to be proper, still I think the principle is, that the person entitled in remainder, or his mortgagee, who stands in his place, is entitled to and may compel such production; and if it be suggested that the purpose for which the documents are required is an improper one, that the burden of the proof of this lies on the person resisting the production. In the present case, this is not attempted, and the Plaintiff has obtained a decretal order from the Court of Chancery, on the 23rd of February, 1847, for the sale of all the property comprised in his mortgage security.

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If there were nothing more in this case, I should not hesitate to direct the production sought for by the Plaintiff, but this case involves many other matters.

It is admitted, that the Plaintiff cannot require the production of documents relating to estates in which he has no interest. He claims no interest except under the deed of the 18th of November, 1841. He takes, therefore, nothing except what Lord *Huntingtower* had to convey at the time when he executed that deed, and only so much of that as is actually conveyed by the deed itself. The answer to the former of these queries, namely, what estate or interest Lord *Huntingtower* had to convey on the 18th of November, 1841, involves several matters of nicety and importance, and requires a statement of the title affecting the lands in question.

The Defendant is tenant for life in possession of three estates, devised under different titles, and which have been conveniently distinguished, in argument, as "*the estate of Earl Lionel*," "*the estate of Earl Wilbraham*," and "*the estate of Sir William Tollemache*." The Plaintiff insists, that his mortgage affects all these

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estates, subject to the life interest of the Defendant. This is disputed on the part of the Defendant, who admits that the Plaintiff's mortgage security includes the estate of Sir *William Tollemache*, but denies that it includes the estate of Earl *Lionel* or that of Earl *Wilbraham*, on two grounds: in the first place, because the mortgagor, Lord *Huntingtower*, had no interest in these estates at the date of the mortgage, by reason of a forfeiture thereof, arising from a non-compliance with a proviso contained in the instrument by which they were settled; and secondly, because even if Lord *Huntingtower* had any interest in these estates, subject to the life estate of the Defendant, he has not conveyed it to the Plaintiff by the deed of the 18th of *November*, 1851.

The title to the estates over which the claim is disputed, is as follows:—[*His Honor here stated, at length, the title, the instruments, the deaths of the parties, the purchase by the Defendant from John Tollemache, &c. &c., and proceeded*]—This, therefore, is the state of the property:—An estate is derived from Earl *Lionel*, and is settled by the deed of the 3rd of *December*, 1804; another estate is derived from Earl *Wilbraham*, and is settled by his will of the 4th of *December*, 1804; and the third estate is derived from Sir *William Tollemache*, and is settled by his will, respecting which last estate no question is raised.

The deed under which the Plaintiff claims was executed on the 18th of *November*, 1841. [*His Honor here stated the material clauses.*] Since the execution of these deeds, a *fiat* in bankruptcy has issued against Lord *Huntingtower*, under which he has been adjudged a bankrupt, and assignees of his estate have been duly appointed.

The Defendant contends, in the first place, that by reason of the non-compliance with the conditions contained in the settlement of the 3rd of *December*, 1804, and the will of Earl *Wilbraham*, the interests which would have vested in Sir *William Tollemache* and his issue, had these conditions been complied with, were, by reason of the non-compliance therewith, forfeited to *John Tollemache* and his issue; that these have been sold by him to the Defendant, and that Lord *Huntingtower* had no interest in them which he could convey to the Plaintiff; and he further contends, that if this forfeiture did not take place, still that the mortgage deed, which I have fully stated neither was by the parties thereto intended to pass, nor did in fact pass his interests in these estates, but that the same are claimed by his assignees in bankruptcy.

In this state of things, I am of opinion that the Plaintiff is entitled to the production of the deeds and documents relating to the estates which passed under the will of Sir *William Tollemache*, but not to those which relate to the estates included in the settlement of the 3rd of *December*, 1804, or to those which relate to the estates which passed under the will of Earl *Wilbraham*. The right to the production of such deeds and documents of title exists, in my opinion, only where the title of the Plaintiff to the interest he claims in the land is clear and undisputed. By using this word, "undisputed," I do not mean that a tenant for life could prevent a reversioner from obtaining a production and inspection of such documents, by simply denying the necessary inference of law, which arises from admitted facts; but I mean where a reasonable cause of litigation exists, and that, in my opinion, is the case here.

A short reference to the principal points discussed

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before me will shew this with abundant clearness. The Defendant claims these lands adversely to the Plaintiff and adversely to Lord *Huntingtower*, under whom the Plaintiff derives his title. The Defendant sets out the particulars of that claim, founded on this alleged forfeiture for non-compliance with the proviso contained in the deed and in the will of 1804, and contends that he has become a purchaser, for valuable consideration, of that interest from the person in whom the estate became vested, in case it was forfeited, in the events which occurred. It is true that 15,000*l.*, the price paid, was a very small sum to give for this purpose, if no doubt existed respecting the forfeiture, but that, he contends, is not a matter to be regarded by this Court; and that, so far as the price is concerned, the matter must be regarded in the same manner as if *John Tollemache*, who claimed and sold the forfeited interest, were now contesting the Plaintiff's right to the production.

The Plaintiff contests this claim of the Defendant, and contends, first, that no forfeiture took place; secondly, that if a forfeiture took place, the purchase of the claim from *John Tollemache*, and the deeds by which it was effected, operated also as a forfeiture of the interest of *John Tollemache*, because he did not convey the property to the uses of the original settlement, in which case the interest of Lord *Huntingtower* would not be affected; and thirdly, that if *John Tollemache* had anything, it was a mere right of entry, which could not, at that time, be conveyed by a deed, inasmuch as this transaction took place prior to the statute 8 & 9 *Vict. c. 106*, and, therefore, that the deeds carrying the purchase into execution took effect merely as a release of that right of entry, which release must enure for the benefit of all persons interested, except the disseisor; and that consequently, in this view of the case,

case, the transaction operated as an entire extinguishment of the right, whatever it was under any forfeiture. But this is not all; if these fail him, he contends, that a tenant for life cannot buy up a claim for the purpose of excluding a reversioner, or those who claim under him, but that he becomes a trustee for them.

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The question of forfeiture itself, at least so far as regards the property devised by the will of Earl Wilbraham, depends, in my opinion, on the construction of the instrument; that is, whether the direction to the devisee to "make, do and execute all such acts, deeds, matters and things, conveyances and assurances, as the trustees should judge necessary, proper or expedient for the purposes therein mentioned," gave the trustees the power to determine whether anything was necessary to be done or not; or whether it left it incumbent on the devisee to endeavour to effect the purpose stated in the will, and only left it to the trustees to determine in what manner that should be effected; in other words, whether the neglect of the trustees to require anything to be done dispensed with the necessity, which was otherwise thrown upon the devisee, of doing something to carry the wishes of the testator into effect; or whether the true construction of the will be, not, that the devisee was, without suggestion from any one, bound to ascertain from the trustees what they thought to be necessary, and to offer to do whatever might be necessary and proper.

On the part of the Defendant it is urged, that it would be a strange construction to hold, if the trustees required the devisee to do an act or execute a deed, both injurious to him and unnecessary to effect the object of the testator, that he must either do that act and execute that deed, or forfeit the estate; and yet that this

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this would follow, as a necessary consequence, from acceding to the Plaintiff's contention and holding, that the devisee was bound to do exactly that and that only which the trustees directed, and that, if the trustee thought nothing was necessary or neglected to do anything, this released the devisee altogether from the obligation imposed on him by the testator.

My intention is to avoid expressing any opinion on these various points, which suggest considerations of great interest and importance, and which have been argued before me with great ability. My object, by referring to them in detail, is to point out, that the Court cannot give the Plaintiff the relief he seeks, without deciding, in his favour and against the Defendant, various collateral questions of considerable nicety and difficulty as to the right to the estate; questions now properly ripe for decision, and which will or hereafter have to be tried at Law or in this Court. To give the Plaintiff the production he seeks, involves necessarily a decision, that he is entitled to the interest claimed. It is, in effect, to decide incidentally the questions, in a manner to conclude no one, but in a manner which may prejudice rights hereafter to arise and to be determined. I repeat my opinion, that in a clear case the Plaintiff is entitled to such production; but that, if the case be not clear, this Court will not give him the relief through the incidental decision of collateral points, but will leave him to establish his right to the estate, at the proper time and in the proper manner. If the matter were now ripe for decision, if the time had come, when, according to the Plaintiff's contention, he was right, he would be entitled to the enjoyment of the property in possession, and if the Plaintiff were seeking to obtain that possession, and the case were so circumstanced, that this Court was the proper tribunal

to give the Plaintiff such possession, if all this were the case, then, as the property is claimed adversely to him, the production and inspection of the deeds and documents relating to that property could only be given incidentally to and consequent upon his obtaining a decree to recover the estate. But here the production and inspection are required, while his right to the estate itself is a matter hereafter to be determined, that right being contested, and the period for deciding it not having arrived. This alone would be sufficient to induce me to dismiss this bill, so far as these are concerned.

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But the questions which spring out of the clauses of forfeiture are not the only obstacles which present themselves in the way of the Plaintiff. Another difficulty of a serious character presents itself in the construction of the mortgage deed itself, under which he claims. The question is, whether the deed, being wholly silent respecting the interest of Lord *Huntingtower* in any estates other than those devised by the will of his grandfather, and the Plaintiff, at least, if not both parties to it, being ignorant of Lord *Huntingtower's* interest in any other property, the general words, "either under the will of Sir *William Tollemache*, or otherwise howsoever," to which I have already pointedly called attention, passed the interest of Lord *Huntingtower* in this property, assuming no forfeiture to have occurred. This is a point which was argued at considerable length on both sides. Conflicting decisions are cited to maintain the propositions adduced, and yet the assignees of Lord *Huntingtower*, under his bankruptcy, who are the persons mainly interested in the question, are not before the Court, to support their interest, which is in direct opposition to that of the Plaintiff.

If my decision were to bind the right to the estate, I
could

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could not, with propriety, do so in the absence of the assignees. I think that I am equally precluded from giving an incidental decision against them, by compelling the Defendant, in their absence, to produce the documents of title relating to the estate in which the claim to be interested. The same principle, therefore, is involved here, which, under the clauses of forfeiture induced me to hold, that the Plaintiff must establish his right to the property before he seeks for production of the title deeds, with this additional impediment, that the adverse claimants are absent.

If the suit instituted by the Plaintiff and the decree obtained by him for enforcement of his mortgage security had determined his right to the estate, the case would have been different, but this is not so. The bill was filed on the 14th of *June*, 1842, the prayer was confined to asking an account of what was due on the mortgage security, and for obtaining a sale of the interest of Lord *Huntingtower* in the estates devised by the will of Sir *William Tollemache*, and the decree, dated the 12th of *July*, 1845, is confined to that estate. On the 18th of *November*, 1846, the Master found 8,234 4s. 11d. to be the amount due, and the cause then came on to be heard on further directions, on the 23rd *February*, 1847, when a decretal order was made, not confined to that estate, but directing a sale of the interest of Lord *Huntingtower* in all and singular the real and personal estates comprised in or subject to the said indenture of mortgage of the 18th of *November*, 1841. This, therefore, even if the last order be not to be interpreted by the prayer of the bill and the prior decree, leaves the matter exactly as it stood before; and, indeed, if it were not, the argument adduced to me would have been superfluous.

The case of Lord *Lempster* v. Lord *Pomfret* (a), lays down, that the Court has a discretion in these matters relative to production of deeds and muniments of title, so far, at least, as regards father and son, and which, if it exist between them, must extend to persons claiming under the son. My opinion is, that, exercising the best judgment I can, this is not a case in which the Plaintiff is entitled, in the present condition of affairs, to any production or inspection of the deeds relating to the estates included in the settlement, or in the will of *December*, 1804.

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The Plaintiff is entitled to a production of the deeds of the property devised by Sir *William Tollemache*, and may have a decree for that purpose; but, as this was not opposed prior to the institution of this suit, and as this suit has been occasioned by his seeking to obtain production of the deeds, to which he is not, in my opinion, entitled, he must pay the costs of the suit up to and including the hearing.

(a) *Ambler*, 154; 1 *Dickens*, 238.

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April 19.

May 7, 8.

Specific legatees of shares in a banking company, held liable to pay the calls made subsequent to the testator's death.

Distinction between the cases in which specific legatees of shares take *cum onere*, and those in which the general personal estate of the testator is liable to pay the future calls for the benefit of the legatees.

Where the interest of the testator in the subject-matter which he professes to

bequeath is complete, or where it is so treated and considered by him and by all persons connected with it, the future calls fall on the legatees and not on the general personal estate. But where further payments are required to make perfect the interest which the testator professes specifically to bequeath, then the general personal estate is applicable for that purpose.

A banking company was established in 1836. By the deed of settlement 5*l.* per share was payable immediately, and the Directors were empowered, at any time, to make a further call of 5*l.*, and on non-payment the shares might be forfeited. The shares were transferable, and, on transfer, the former proprietor was released. Legatees and executors might sell, but were not to be members until a transfer to them, and until then, were not entitled to the current dividends. The shareholders thereby covenanted to observe the clauses of the deed. A shareholder died in 1843, having specifically bequeathed his shares to infants. The executors, in 1845, transferred the shares into their own names, and they assented to the legacies. Afterwards, in 1848, the further call of 5*l.* per share was made. Held, that it was payable by the legatees and not out of the testator's residuary estate.

ARMSTRONG v. BURNET.

THE question in this case was, whether a call on shares in a banking company, made five years after the testator's death, was payable out of his residuary estate, or by the specific legatees of the shares.

The testator, by his will, "gave all his shares in the *Northumberland and Durham District Banking Company*, to his grand nephews and grand nieces" [describing them] "equally to be divided between them."

The testator died in 1843, being the registered proprietor of 1,180 shares of 10*l.* each, on which two instalments of 2*l.* 10*s.* had been paid. He was the original proprietor of some of the shares, and had executed the deed of settlement in respect of the others, which he had acquired by purchase. The legatees, being all infants, were incapable of electing to accept or decline the shares, and as, by the rules of the banking company, the dividends

dividends could not be paid while the shares stood in the name of a deceased person, the executors, in 1845, transferred the shares into their own names. They also assented to these specific legacies, in 1847 they paid the legacy duty on them, and they also received the dividends.

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At the testator's death, seven years had elapsed since any call had been made, and it did not appear that one was expected to be made; but in October, 1848, (five years after the testator's death,) a further call of 5*l.* per share was made, amounting on these shares to 5,900*l.* This was payable by three instalments, with an option of paying the whole at once, on certain terms considered to be beneficial to the holders of shares. The executors borrowed 5,000*l.* for that purpose, and paid the whole calls at once. They received altogether 6,953*l.* for dividends on the shares subsequent to the testator's death. In 1853, the executors paid off the loan of 5,000*l.*

The shares had fluctuated in value, and, though worth 8,260*l.* at the testator's death, their value, at present, after paying the call of 5*l.* per share, did not exceed the same sum. Under these circumstances, the legatees, on the one hand, insisted, that the call of 5*l.* was payable out of the testator's residuary estate. On the other hand, the residuary legatees contended, that the call ought to be borne by the legatees of the shares. This suit was, in consequence, instituted by an executor, to have the rights of the parties ascertained.

The argument principally turned on the effect of the deed of settlement, to the provisions of which it is now necessary to advert in some detail. This banking company was established in 1836, under the Banking Act,
7 Geo. 4,

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7 Geo. 4, c. 46, and by the deed of settlement, dated the 1st of July, 1836, made between the directors of the first part, the registered public officers of the second part, the trustees of the third part, and the shareholders of the fourth part. After the usual provisions for establishing the company, the 8th clause provided for the entry in the "Shareholders' Register" book of the names, &c. of the shareholders.

"The personal representatives or legatees of any shareholder who should die" were to give notice, specifying the names and residences; and the "Shareholders' Register" was to be conclusive evidence of proprietorship on behalf of the company. By article 1, no shares were to be held jointly, except on trust, and the first-named trustee was to be deemed proprietor, for the purpose of voting, &c. The registered proprietor was to be deemed the beneficial owner, and the company were not to be bound to notice any trust, or any gift by way of legacy, until the legatee should become a shareholder.

Provision was made for the almost immediate payment of two instalments of 2l. 10s., and the 17th clause provided, that, in addition to this 5l., the directors should have full power, from time to time or at any time, to call for and require the payment, by each and every shareholder, of the further sum of 5l. in respect of every share. The directors were to have full power to sue for such call, and in default of payment to forfeit the share.

By the 21st clause, shares might be sold with the consent of the directors, but if they refused their consent, they were bound to purchase.

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By the 23rd clause, all sales and transfers of any *shares*, not made conformably to the provisions of the *deed* of settlement, were to be invalid at law and in *equity*.

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The 25th clause provided, that whenever any shares should be duly vested in a new holder, then, and not before, the future responsibility of the previous holder should *cease and determine*, and such previous holder, and all persons claiming by, from or under him, shall be *exonerated* and released from all subsequent claims, demands, liabilities and obligations, in respect of the *same* shares, and from all future observance and performance of the covenants, conditions, stipulations and agreements.

The 27th and 28th clauses provided, that the executor or legatee of any deceased shareholder should not be a member, but should be at liberty either to sell the shares or to become a member in respect of such shares, by *giving* notice of his desire, "whereupon, and upon otherwise complying with the provisions of the deed of settlement," he shall be admitted and become a member of the company in respect of such shares, and have the same transferred into his name accordingly, and shall stand and be personally charged with the duties and liabilities incident to the ownership of the same."

By the 29th clause, the executor, administrator or legatee of any deceased shareholder, not electing to become a member, was not to be entitled to receive any dividend becoming due after his title should have accrued, but it was to remain in suspense, until a new proprietor should be substituted.

The 30th clause gave right of forfeiture, in case of

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any legatee or representative neglecting or refusing to execute the deed.

By the 100th clause the several persons to the deed covenanted with the others, to observe, &c. all the clauses and stipulations "which were or ought to be observed, &c. by the covenantor, or his or her heirs, executors or administrators, respectively, in respect of or in relation to such share or shares respectively, *so for the time being remaining part of his or her assets*, and according to the true intent and meaning of the same covenants," &c.

Mr. Toller, for the Plaintiff, stated the case.

Mr. Follett and Mr. Giffard, for the specific legatees, argued, that this call was a liability of the testator upon his covenant, which his estate was bound to discharge, and referred to the 100th clause of the deed for the purpose of shewing, that the testator had covenanted to perform the obligations contained in the deed, which included the payment of future calls. They referred to the cases of *Blount v. Hipkins* (a); *Jacques v. Chambers* (b), and *Clive v. Clive* (c), as establishing the right of the specific legatees to have the call paid as a debt out of the testator's residuary personal estate.

Mr. Lloyd and Mr. Prior, for the residuary legatees. All the existing liabilities had, at the testator's death, been performed. If the specific legatees had been adult, it would have been the duty of the trustees forthwith to have transferred the shares into the names of such legatees, and all liability on the part of the executors would

(a) 7 Sim. 43.

(b) 2 Collyer, 435; 4 Railw.

Cas. 499.

(c) 1 Kay, 600.

would then have ceased. The circumstance of their being infants cannot alter or affect their rights, or increase or diminish the extent of the liability of the testator's residuary estate. At all events, on the transfer of the shares into the names of the executors, in *October, 1845*, all liability ceased, the estate of the testator never became liable to pay the call, and the legatees themselves have adopted this act of the executors. The case is analogous to a bequest of leaseholds, in which the specific legatee takes *cum onere*, and subject to the obligation of discharging the future rent and of performing thenceforth the covenants contained in the lease. In this case, on the transfer of the shares into the names of the executors, and on their assenting to the legacy, the estate of the testator became discharged from all further liability, and the executors became, in fact, the trustees for the specific legatees; *Fitzwilliams v. Kelly*(a). It is the opinion of an eminent judge, "that the doctrine has already been carried too far;" *Barry Harding*(b). In *Blount v. Hipkins* there were no means of determining the liability.

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Mr. *Follett*, in reply. The transfer by the executors into their own names was an act of duty and necessity, to prevent a forfeiture; they were entered as "executors," and therefore the liability of the estate continued, for the shares are now as much part of the estate of the testator as they were at his death. No act, however, done by the executors could in any way prejudice the rights of infants.

The MASTER of the ROLLS. I will look over the deed and authorities before I decide this case.

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(a) 10 *Hare*, 266.

(b) 1 *Jones & Lat.* 475, 490.

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May 7.

The MASTER of the ROLLS.

The questions in this cause were, whether the payment necessary in respect of a call on certain banking shares, specifically bequeathed by the testator, must be borne by his general personal estate, or by the specific legatees thereof.

Although alone it may not dispose of the whole question, still an important consideration in the case is whether the liability of the testator's estate to the payment of this call did subsist at the time when the call was made. I have not found any case in which the general personal estate of the testator has been compelled to bear this payment, unless where such liability subsisted at the time when the call was made. I think it desirable shortly to refer to the reported decisions.

The case of *Blount v. Hipkins* (a) was to this effect:—The testator had taken shares in the *London and Birmingham Railway Company*. He executed a deed on 15th of *October*, 1830, by which he covenanted to pay the future instalments on his shares, necessary for the completion of the railway within ten years. He died in 1831, and the act passed in 1833. By his will he had exonerated his personal estate from payment of his debts, which he had thrown on the real estate, and he specifically bequeathed these shares to his widow. It was clear that the liability of the estate continued, and the Court held, that the calls must be paid out of the real estate.

Jacques v. Chambers (b) was substantially the same point.

(a) 7 Sim. 43.

(b) 2 Collyer, 435; 4 Railw. Cas. 499.

point. That case related to shares in the *Great Western Railway Company*, which had been specifically bequeathed, and the Court ordered a sufficient sum to be set apart to answer the future calls, to pay which, the estate of the testator, under his covenant, remained liable.

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Clive v. Clive (a) was to the same effect. The testator had bequeathed the interest and annual income "arising from all his shares in the *Peninsular and Oriental Steam Navigation Company*, and from his *Birmingham Gas* shares, to his wife for her life," and after her death or marriage, he gave it over to other persons. The calls, which were a liability of the testator's estate, were ordered to be paid out of that estate.

Marshall v. Holloway (b) was a case in which the testator had entered into a covenant to erect buildings on a leasehold estate. This leasehold estate he specifically bequeathed to his daughter for life, with remainder to her children. It was held, that the personal estate must bear the expense of performing the covenant.

Wright v. Warren (c) was a similar case, and there the Vice-Chancellor reluctantly followed *Blount v. Hipkins*. It appears from the Master's report, that the testator's estate was liable to pay all these calls, except calls on five shares in a chartered gas company, but no distinction seems to have been raised on this subject or submitted to the consideration of the Court, and it is to be observed, in this case, that, although the testator had twenty shares in the *London and Westminster Bank*, of 100*l.* each, on which shares only 20*l.*

(a) *Key*, 600.(b) 5 *Sim.* 196.(c) 4 *De G. & Sm.* 367.

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20*l.* each had been paid, and that 80*l.* on each share might still be called for, nevertheless the Court did not set apart any fund to meet that possible future liability.

In *Barry v. Harding (a)*, Lord *St. Leonards* held, that the specific legatee of leaseholds was not liable to pay the amount due from the testator, at his decease, for head rents, respecting which there could be no question, but he shewed no disposition to extend the doctrine of *Blount v. Hipkins*.

The case of *Fitzwilliams v. Kelly (b)* appears to me to lay down a principle and draw a valuable distinction affecting this subject. In that case, leaseholds were devised, a fine was payable in respect of the admission of trustees, which had become necessary during the life of the testatrix; it was held that this was payable out of the general personal estate. But another fine was also payable, in respect of the admission of trustees, which became necessary after the death of the testatrix, and it was held, that this latter fine was properly payable by the devisees. That the devisees of leasehold estates take the property *cum onere* cannot be doubted; but that case establishes, that although every thing that is due from the testator at his death must be paid out of his residuary personal estate, yet that what may become due subsequently to his death is not so payable, although, by reason of his covenant, his personal estate may remain liable thereto, so far as regards the covenant, but that this amount is properly payable by the devisee of the leasehold interest.

A distinction is, I think, to be found (although perhaps not very clearly defined in these decisions) between

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(a) 1 *Jones & Lat.* 475.

(b) 10 *Hare.* 266.

such cases as those of *Blount v. Hipkins* and *Jacques v. Chambers*, and such a case as the present. In those two cases the testator had contracted to take shares in a railway, to acquire a title to which the whole amount of each share subscribed would be required. It seems to me that it is reasonable to assume, that the testator intended to give the whole share for which he had subscribed to his legatee, and that the accident of his death occurring sooner or later ought not to affect this bequest. But in other cases, the full amount of the share subscribed for is not intended to be paid or expected to be required. The first payment is supposed to be also the last, and the testator sees no prospect of any further liability at his decease. The common instance of a company for insurance will illustrate my meaning. In these cases, the shares subscribed for may be 100*l.* each; this amount is specified to meet the liability which the company may possibly incur; 5*l.* per share is paid up, the company goes on realizing large profits, which are divided, year after year, in the shape of dividends; many years after the death of the testator, in consequence of some great and unforeseen loss, a further call becomes necessary; the estate of the testator still continues liable under his covenant, but it may, I think, be reasonably doubted, whether the rule laid down in *Blount v. Hipkins* could be applied to such a case. If it were to arise, I do not apprehend that the learned Judges who decided *Blount v. Hipkins* and *Jacques v. Chambers* intended to lay down that the rule applied to every case of calls made after the death of the testator, for which his estate continued liable, whatever might be the circumstances under which the original shares were taken. It is, I think, on this distinction alone, that the omission of the Court to provide for the possibility of further calls on the *London and Westminster Bank* shares, in *Wright v. Warren*, can be explained.

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Both the elements which I have noticed as affecting the decisions to which I have referred, appear to me to exist in the present case in favour of the residuary legatees. In the first place, in my opinion, in the case before me, when this call was made, the liability of the testator's estate to pay the amount due in respect thereof did not exist. I think that this is established by the clauses of the deed, which establishes the company, combined with the acts of the parties themselves. The 17th clause provided, that a further sum of 5*l.* per share might be called for, and, by the 110th clause, the testator covenanted for himself, his heirs, executors and administrators, to perform and fulfil all the covenants, clauses and stipulations contained in the deed, and which ought to be performed by him in respect of his shares. Under these clauses, I think that the testator's estate was, at his death, liable to pay the call of 5*l.* per share, whenever that call should be made, and that this liability continued until the shares were transferred out of his name into that of some other person.

By the 25th clause, on the transfer of shares to a fresh holder, the liability of the former holder ceases. This is transfer may, under the provisions of the deed, take place in one of two methods. First, it may take place by transfer to a purchaser, for which purpose various rules and restrictions are imposed by the deed, but which, as they do not apply to this case, I pass over, or it may take place by transfer into the name of the legal personal representative, under the 28th section.

The executors, in this case, thought fit to avail themselves of this clause, and in *April*, 1845, before any call had been made or even contemplated by the company, these shares were transferred to the executors. By this act they did, in my opinion, make themselves trustee

trustees for the legatees, who were then all infants. The infants on attaining twenty-one adopt this act, and claim the legacy. The effect of this, in my opinion, is exactly the same as if these shares had, at that time, been transferred to other persons, in trust for the legatees, or as if the legatees, having attained twenty-one, the transfer had then been made to them, personally, in the proper proportions.

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It is material to consider this transfer in two points of view; first, as regards the company itself; and secondly, as regards the persons interested under the testator's estate. As regards the company, the executors had, by this transfer, become shareholders, and they were personally liable to pay these calls to the company, whether the testator's estate was solvent or insolvent. The assets of the testator were no longer liable to make these payments. I hold it to be clear, under this deed, that the Directors, having permitted the transfer, the estate of the testator was thereby discharged from all further liability to the company, however ample that estate might have been, and although the executors personally might be unable to pay.

The liability to pay the call subsequently made, therefore, cannot be treated as one of the liabilities which attached to the testator's estate. It was not a debt due from him; he had entered into a covenant to pay a future call of 5*l.* per share on his shares only so long as they remained untransferred from his name into that of some other person. The cases therefore of *Blount v. Hipkins* and *Jacques v. Chambers* do not apply.

As between the persons interested under the testator's will, I think that this call must be borne by the legatees and not by the general personal estate. As
the

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the payment of the call could not have been enforced by the company against the general personal estate of the testator, the liability of the general personal estate to bear this payment, or in other words to exonerate the trustees from the payment thereof, if at all, can arise only by reason of some intimation of an intention to that effect, to be gathered from the will of the testator. But nothing of that sort is to be found in it; on the contrary, the intention fairly attributable to the testator is, that the legatees should take their legacies *cum onere*, and this is one of the burdens incidental to the gift.

In *Blount v. Hipkins* and *Jacques v. Chambers*, I apprehend, that the Court would not have directed payment, out of the general personal estate, of any calls which had been made after the full payment of all that was due on each share (assuming that any such call could have been made), and after the transfer of the shares to the legatees. If this were not so, it would seem to me to follow, that if a testator had specifically bequeathed shares in a company to one, who got them transferred into his own name, and that company afterwards failed, and thereupon a contribution were required in respect of the share so bequeathed, then that in such a case the testator's general personal estate would be liable to pay such contribution. This is not, I think, the effect of the decisions or of the law.

It was argued, however, with great force, that the mere fact of the transfer to the executors cannot alter the right between themselves and the persons interested in the testator's estate, and that, to permit such transfer to have such an effect, would be to enable the executors, by favour or caprice, to alter the rights of the parties and the disposition of the testator's will. I do not adopt that argument to its full extent; though generally true,

true, it is liable to many qualifications; but adopting it in the present case, for the purpose of the arguments, I still remain of opinion, that this is a burden to be borne by the legatee. I am disposed to believe, that the distinction which regulates these cases is that which I have before referred to, as being indistinctly admitted in some of the cases cited, and particularly in the case of *Wright v. Warren*, and I think that the distinction is involved in the answer to this question:—was the subject-matter of the testator's bequest complete in itself when the bequest took effect? In *Blount v. Hipkins* and *Jacques v. Chambers* the testator bequeathed shares in a company to be formed, the shares and the interest of the testator in them were not complete, and therefore the liability he was under to complete his interest therein fell on his general personal estate. This seems to me also to be the principle of the decision in *Marshall v. Holloway*, and also in *Fitzwilliams v. Kelly*. Where the interest of the testator, in the subject-matter which he professes to bequeath, is complete, or where it is so treated and considered by him and by all persons unconnected with it, as in the case suggested of a share in an insurance company, I think that the future calls fall on the legatee and not on the general personal estate; but where further payments are required to make perfect the interest which the testator professes specifically to bequeath, then, I think, that the general personal estate is applicable for that purpose.

To apply this to the present case: if the transfer had not taken place to the executors, I should still be of opinion that the burden of paying this call must fall on the legatees. But if this call had been contemplated before the death of the testator, and had been required to make his interest in that share complete (as, for instance,

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instance, if the further call were required before the company could be worked, or before any dividends could be paid), then I should have been of opinion that the general personal estate of the testator ought to have borne the expense of these calls. This distinction may possibly give rise to some difficulty and some nicety in some cases, but not, I think, an insurmountable one. Whether however this be so or not, it appears to me to be a reasonable principle, and one by which all the decisions on this subject may be reconciled.

The result is, that in my opinion this call of 5l. per share must be borne by the legatees of the banking shares, and that the residuary legatees are exonerated from all contribution in respect of it.

HOPE v. LIDDELL.

May 2.

A *subpœna duces tecum* to produce and testify at the hearing will not be issued except to the extent of the old practice.

The lien of a solicitor on documents does not relieve him from the necessity of producing them for the purposes of evidence at the instance of third parties.

MR. CLIPPERTON, a solicitor, was served with a *subpœna*, on behalf of the three Defendants, — to produce a deed before the Examiner. He attended, but refused to produce it, on the ground that he had a lien on it for the costs of its preparation. The deed had been prepared by him for Benjamin Norton, deceased, and neither of the three Defendants, on whose behalf the production was sought, was his representative. Application was then made to the Record and Writ Clerk to seal a *subpœna duces tecum* to attend the Court at the hearing of the cause and produce the deed, but he declined to seal such *subpœna* without the order of the Court.

Mr. R. Palmer and Mr. Amphlett now moved that

the Record and Writ Clerk might be directed to seal the *subpœna*.

The MASTER of the ROLLS.

I think the Record and Writ Clerk right. There is no power under the old practice, it is only under the new practice. You may either proceed under the old practice or the new. The old practice is this:—you obtain an order to examine witnesses to prove a deed *vivâ voce* at the hearing. You then obtain a *subpœna duces tecum* to produce and prove it, and you serve the witness. When he attends, the only question you can ask is, “is that your name and handwriting,” and if he refuses to produce, you are stopped. Under the new practice the Court, if it sees fit so to do, may require the production and oral examination of a witness, but I shall not order the production and examination of witnesses at the hearing of the cause without special reason, unless it be shewn that it cannot be done before (a).

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Mr. *R. Palmer* and Mr. *Amphlett* now moved, that Mr. *Clipperton* might be ordered, at his own expense, to produce the deed before the Examiner, and pay the costs. They relied on *Brassington v. Brassington* (b) as being a case in point, and argued that a solicitor could not, on the ground of lien, deprive a party of the evidence necessary to prove his case.

May 8.

Mr. *Follett* and Mr. *Edmond James*, *contrà*, for Mr. *Clipperton*. A solicitor is not bound to produce any document

(a) See *Griffith v. Ricketts*, 7 Hare, p. 301; *May v. Biggenden*, 1 Smale & G. 133; *Smith's Prac.* 245, 255 (5th edlt.); *Graves v. Budget*, 1 Atk. 443; 15 & 16 Vict. c. 86, s. 39; *Ordines Can.* 293, 339.
(b) 1 Sim. & Stu. 455.

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document until his lien for preparing it is discharged. This was decided by Vice-Chancellor *Wigram* in *Griffith v. Ricketts* (a), who refused to order a solicitor, claiming a lien on a deed, to produce it, observing "that such an order would not be made as against a mortgagee, and the case of a lien was, in substance, the same." The solicitor has the same rights as a mortgagee, and ought not to be compelled to produce a deed prepared by him until it has been paid for. A solicitor's lien would be nugatory if he were ordered to produce the documents whenever required. *Thompson v. Moseley* (b), *In the matter of the Oxford and Worcester Extension, &c. Railway Company* (c) were also cited.

The MASTER of the ROLLS.

I am of opinion that Mr. *Clipperton* is bound to produce the deed. The lien of a solicitor entitles him to retain documents on which he has a lien against all the world, and I have always expressed an anxiety to preserve to solicitors the benefit of their lien, but there is a marked distinction between a production of documents for the purposes of evidence, and taking them out of a solicitor's possession.

A solicitor's lien must be the same, whether he is the solicitor in the cause or is a mere witness, and in a cause it is a matter of daily experience, notwithstanding a solicitor has a lien on the papers in the cause, to compel their production. Why should his rights in respect of his lien be different when he is called upon as a witness, to produce papers in his possession for the purposes of justice? The only question now is, whether the

(a) 7 *Hare*, p. 303.
 (b) 5 *Cur. & P.* 501.

(c) 1 *De G. & Sm.* 728.

the **lien** of a solicitor on a deed can entitle him to prevent its being given in evidence in this cause, I think not.

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There is a marked difference between the rights of a mortgagee and that of a solicitor having a lien on papers. The mortgagee has no lien on the deeds; he has a charge on the land. At law, he is the owner of the estate, the deeds evidence his title to the property, and the Court, therefore, will never compel him to produce the evidence of his title, until his claims have been paid. But a lien on deeds does not affect, and is not a charge upon, the property; it affects merely the parchment or paper which happens to be in his hands. Lord *Lyndhurst* thought that the lien on a document was no reason why it ought not to be produced for the purposes of justice at the trial; and Sir *John Leach*, in *Brassington v. Brassington*, compelled a solicitor to produce documents on which he had a lien for the purposes of evidence. The case of the *Oxford and Worcester Railway Company* was very different; there the order was for the delivery up of the papers, which is a different and distinct matter. It is obvious that no order for the delivery up of the documents can be made, but it is the right of the parties, and essential to the due administration of justice, to have it in evidence, and I am of opinion that Mr. *Clipperton* is bound to produce this deed before the Examiner. I am, however, of opinion that he is justified in saying he will not part with it.

No costs.

NOTE.—An order was drawn up directing Mr. *Clipperton* to produce the deed. He attended the Examiner (*June 7th*) and produced it, but declined to allow it to be looked at by the parties until his lien had been satisfied. A motion was made to commit him (*June 12th*). The Master of the Rolls observed, that Mr. *Clipperton* had misunderstood his order,

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for, though he did not intend that the deed should not be taken from him, he meant that the contents of the deed should be read, otherwise the order would be nugatory. He directed the motion to stand over on Mr. *Clipperton* undertaking to move before the Court of Appeals to discharge the order of the 8th of May. On appeal, the order of the Master of the Rolls was affirmed by the Lords Justices on the 30th of June, 1855.

ESSEX v. ESSEX.

May 2.

Two persons seised of freeholds agreed to carry on business in partnership upon the premises for fourteen years, and that if either died during that term, the survivor should purchase the freeholds at a stated price. The fourteen years having expired, they, by parol agreement, continued the partnership "on the old terms." One afterwards died intestate. Held, that the stipulation as to purchase was binding, and that the freeholds were converted into personal estate, and did not pass to the heir.

WILLIAM ESSEX and his brother *Thomas Essex* were seised in fee of some freehold messuages in *Stanhope Street*, and entitled to certain leaseholds there, which they derived under the will of their father. They agreed by deed to become partners in the business of curriers and tanners, for a term of fourteen years from the 1st of *January*, 1837, and to carry it on upon these premises, which were fitted for that purpose.

The partnership deed contained a clause, which, as far as is material, was as follows:—

"In case either of the said parties shall depart this life during the said copartnership term, the said copartnership shall wholly cease, and the surviving partner shall purchase and take all the share, estate, right, title and interest of the deceased partner of and in the said freehold messuages and premises, Nos. 27 and 28, *Stanhope Street*. For the purpose of ascertaining and settling the price or value to be paid by the surviving partner for the said freehold messuages and premises, Nos. 27 and 28, *Stanhope Street*, it is agreed, that the entirety of the same, including the plant and tan pits, shall be valued

Admissibility of evidence of a parol contract as to the continuance of a partnership where real estate is concerned.

valued at the sum of 5,000*l.*, and each undivided moiety at 2,500*l.*"

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The term of fourteen years expired in *January*, 1851, after which they continued to carry on the business together, but they entered into no new articles of agreement for the copartnership, and no break was made. They continued to carry on business in partnership on the premises on the same terms, as to division of profits and otherwise, as they had done during the fourteen years, until *July*, 1854, when *Thomas Essex* died intestate, leaving the Plaintiff, his widow and administratrix, and the Defendant, *Thomas Essex* the younger, who was his heir, and other children.

The Plaintiff now insisted, that the stipulation for the purchase of *Thomas's* moiety of the freehold messuages, at 2,500*l.*, was binding, and that the purchase-money was personal estate; but the Defendant, *Thomas Essex* the younger, on the contrary, contended, that on his father's death, intestate, the freehold became vested in him.

The solicitor of the partners, in his affidavit, stated, that shortly after the termination of the term of fourteen years, he was consulted by the parties, and suggested the renewal of the partnership agreement, by fresh articles, but he "was informed by both of them, that they did not consider it necessary, inasmuch as they intended to remain in partnership on the old terms."

By this bill, the Plaintiff prayed, that the agreement for the purchase of this moiety of the freehold messuages and premises at the price of 2,500*l.* might be specifically

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specifically performed, and that the rights of the parties to the purchase-money might be declared.

Mr. *R. Palmer* and Mr. *H. R. Farrer*, for the Plaintiff. The stipulation as to the surviving partner taking the share of the deceased partner in the plant and freeholds, at a fixed price, was operative at the death of the intestate. By continuing the partnership after the expiration of the fourteen years, the partners adopted all the provisions of the articles, except as to the duration of the partnership. The law is clearly stated by Sir *Anthony Hart* in *Booth v. Parks* (a). He says, "We know, that after the expiration of the term at first agreed upon, partnerships frequently continue without a new agreement; and the effect of that is, that the partners, after the expiration of the partnership term, continuing to carry on the trade without a new deed, all the old covenants are infused into the new series of transactions, with the single exception of the covenant for duration; for either may *instantly* dissolve the prolonged partnership, but all the other original stipulations are continued." [*The Master of the Rolls*. The case seems like that of a tenant holding over after the expiration of the term.] That would be the law independent of any subsequent contract, but here, the evidence proves an agreement to carry on the business on the old term.

Secondly, there being a valid contract for sale at the death of the intestate, the produce is personal estate. The case of *Cookson v. Cookson* (b), which will be cited, is not consistent with *Ripley v. Waterworth* (c). The plant is intermixed with the premises, and cannot be severed;

(a) 1 *Molloy*, p. 466.(b) 8 *Sim.* 529.(c) 7 *Ves.* 425.

severed; the whole is partnership property and personal estate.

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Mr. *Lloyd* and Mr. *Fowler*, for the surviving partner, insisted on his right to purchase the plant and premises at the price fixed. They cited *Cook v. Collingridge* (a); *Hutton v. Warren* (b); *Doe d. Rigge v. Bell* (c).

Mr. *Roupell* and Mr. *Welford*, for the heir. First, and apart from the stipulation as to purchasing the real estate, the fact that the property was used for partnership purposes is insufficient to change its nature and convert it into personalty. Real estate purchased out of the partnership monies for partnership purposes will be considered personal estate, but the rule is inapplicable to a case where it is not purchased by the partnership, but is vested in the partners independently of it; *Smith v. Smith* (d); *Randall v. Randall* (e); *Balmain v. Shore* (f). In the latter case, there was a purchase by partners of real estate, and a conveyance to them and their respective heirs, equally, as tenants in common, &c., to be used in trade during the partnership, with covenants against alienation and partition; the answer stated, that the purchase-money of the freehold premises was paid, not out of the partnership effects, but out of the separate property of each partner. On the question whether this was real estate, Sir *William Grant* said, "After the case of *Thomas v. Dixon*, reported in *Browne* by the name of *Thornton v. Dixon*, that is not a question that admits of argument, for this is rather a stronger case for the heir than that. There it was purchased generally, applied to the uses of the partnership, and apparently was purchased for no other end, yet it was considered

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| (a) <i>Jacob</i> , 620. | (d) 5 <i>Ves.</i> p. 193. |
| (b) 1 <i>Mec. & Wels.</i> 466. | (e) 7 <i>Sim.</i> 271. |
| (c) 5 <i>Term R.</i> 471; 2 <i>Smith's</i> | (f) 9 <i>Ves.</i> p. 508. |
| <i>Leading Cases</i> , 72. | |

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considered to be real estate by Lord *Thurlow*. Here the parties have limited and defined the extent of the interest the partnership was to have in the real property. Considering themselves as owners of the real estate, as tenants in common, they stipulate that the partnership shall have a certain ownership, notwithstanding that interest in them as tenants in fee. The premises are to continue to be used in the trade as long as the partnership lasts. They can claim nothing as partners except through the covenants. Subject to the covenants it goes as real estate." "The question for my decision is only whether I can declare this real estate to be personal property, to go as the shares of the partnership. That I am of opinion I cannot declare."

The partnership had nothing but the right of user of the land, so long as the partnership subsisted, and the law relative to the quality of partnership property does not affect the question of conversion, which depends on the special contract.

Secondly, the proviso that the surviving partner should purchase the freeholds, is limited to the event of one dying "*during the said copartnership term*," that is, during the fourteen years. It therefore ceased on the 1st of *January*, 1851.

But it is said, that it was revived, first, by the circumstance of the partners having continued to carry on the business after that period; and secondly, by express agreement. On the first point, however, the case of *Cookson v. Cookson* (a) is a conclusive authority in favour of the Defendant. In that case, A. carried on trade upon land of which he was seised in fee. Afterwards he took one of his sons into partnership for twenty-four years, and conveyed to him, in fee, certain shares in the land, and by their articles of partnership they covenanted that the land should,

(a) 8 Sim. 529.

should, at all times thereafter, be held as partnership property, and be considered and treated as part of the joint stock of the trade; and it was provided, that if either partner died or retired during the twenty-four years, his copartner might purchase his share at the sum stated to be its value in the last yearly accounts. In the course of the twenty-four years, 1,700*l.* was expended out of the partnership funds, in building on the land. After the expiration of the twenty-four years, and until A.'s death, he and his son continued to carry on their trade on the land, without entering into any new agreement. Held, that the son's right of pre-emption, as to his father's share of the stock, including the land, expired with the term of twenty-four years, and that, all the debts of the partnership having been paid, A.'s share of the land retained its original character and descended to his heir. Sir *Launcelot Shadwell*, in regard to the right of purchasing, observes (a), "The clauses which relate to what was to be done, if at any time before the expiration of the term of twenty-four years, either of the parties should be desirous to sell his share, or should die without having bequeathed his share to a son, are clauses which apply only to the specific case which is there pointed out, and do, by no means, even by reference, apply to the case which did happen, namely, to the case that the original term of twenty-four years did actually expire, and that the father and son continued to carry on the partnership business without any new stipulation, until the death of the father in 1831. It seems to me that the effect in law was this, namely, that inasmuch as when they continued to carry on the partnership after the expiration of the original term, without entering into any new stipulations, the stipulations that were in the old articles did

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(a) 8 *Simons*, p. 546.

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did apply as far as they could, but the stipulation with respect to the purchase of a deceased partner's share could not apply, inasmuch as that stipulation had reference only to the contingency of one of the partners dying during the continuance of the term."

Then it is said, that there was a subsequent contract, by which this stipulation is engrafted on the continuing partnership, but, as regards real estate, this was a mere parol agreement, void under the Statute of Frauds; besides which, it carries the case no further than if there had been no evidence at all, for they are represented to have said, "that they intended to remain in partnership on the old terms;" that, as in *Cookson v. Cookson*, means the terms exclusive of the right to purchase, which has expired. In *Emuss v. Smith* (a), the Court remarked, "That no one could read the judgment in *Townley v. Bedwell* (b), and not see that Lord Eldon thought that *Lawes v. Bennett* (c) had gone far enough."

The MASTER of the ROLLS.

I am of opinion that the clause in question is binding on the estate of the deceased partner, as well as on the survivor.

The case stated is to this effect:—Two gentlemen agreed to enter into partnership, as curriers and tanners. They were possessed, as tenants in common, of certain freehold premises, which were suited for the purpose of the trade. They enter into articles, by which they agree that the partnership shall continue for fourteen years, and which contain various other stipulations, some relating to the accounts, others relating to the mode in which the trade is to be carried on, and others as to the way in which the property is to be dis-
posed

(a) 2 *De G. & Sm.* p. 734.

(b) 14 *Es.* 591.

(c) 1 *Cox*, 167.

posed of at the expiration of the partnership. They enter into various covenants; one is, that in case either party to the deed should die during the term, the survivor shall purchase the share of the deceased partner in the freeholds. It is not disputed that this clause was binding during the continuance of the partnership articles.

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The term expired in *January*, 1851, and about three years and a half afterwards one of the partners died, but in the meanwhile, after the expiration of the fourteen years, the two partners had agreed by parol to carry on the partnership on the terms of the deed, and the question is this:—is this agreement binding on them.

I express no opinion on *Cookson v. Cookson*, or whether it is to be followed in all cases or not; I think it does not apply to this case. This is a case to which the Statute of Frauds does not apply, for a partnership, the terms of which have been settled by parol, is as good as one the terms of which have been settled by writing. It is clear, that if they had carried on the partnership for a year they were at liberty to do so, and the terms agreed upon would be perfectly binding on them. All I have to ascertain is, whether in fact it was part of the arrangement, that this stipulation should form part of the conditions on which they continued to carry on the partnership. Suppose they had indorsed on the partnership articles that they had agreed to carry on the partnership for seven years, on the terms contained in the articles, would any body doubt that the stipulations would be binding on both parties? If they agreed to carry it on for one year, these terms would have been as binding as for seven years; so if they had agreed to carry the partnership on at pleasure, these terms would have been equally binding on the parties until it was determined. I am at a loss to discover on what principle

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the Court can stop short. The agreement is, that the accounts for fourteen years shall be taken in a particular manner; they continue the partnership after the expiration of that term; is this clause binding? Are they to take the accounts in the same manner? It seems that there is a clause in the articles that the accounts are to be taken yearly, and to be binding on them, would not this clause be binding? If there was a clause that they should not pledge the partnership assets during the fourteen years, would not that apply to the new partnership? and does not the same principle apply to the division of property? On what principle can it be contended that the mode in which the estate, which has been used for partnership purposes, is to be divided is not to be as binding as the mode of carrying on the business, of taking the accounts, or the prohibition against pledging the partnership assets, all of which are expressed to be only during fourteen years. In the case I have supposed, viz. that they had indorsed on the articles that they had agreed to continue the partnership on the same terms, I am of opinion they would be bound. Assume here they did it by parol, and that they stated "that they intended to remain a partnership on the old terms." This, no doubt, would constitute a partnership during pleasure, which either of them might dissolve when he pleased; but I concur with Sir *A. Hart*, that the continuing partnership was varied only as to the term of its duration, and that all the other stipulations exist. I am at a loss to understand how the partners are to be bound by every other stipulation, and that the Court is to say, with respect to this one, that it is not binding, though no reason is given why it should not be equally binding. I must make a decree for specific performance, according to the prayer, and I am of opinion that the property is personal estate.

NOTE.—See *King v. Chuck*, 17 *Beav.* 325; and *Darby v. Darby*, Vice-Chancellor *Kindersley*, 8th *March*, 1856.

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HONYWOOD v. HONYWOOD.

AN application was made to the Court for its sanction to the marriage of Sir *Courtenay Honywood*, an infant ward, who had recently attained the age of twenty.

Mr. *Lloyd* and Mr. *Jessel* appeared for the Petitioner.

Mr. *Selwyn* for the lady.

Mr. *R. Palmer* and Mr. *Shapter* for Lady *Honywood*.

May 3, 8, 26.
Disinclination of the Court to sanction the marriage of an infant ward, where it is impossible for him, by reason of his infancy, to settle his real estate so as to go along with his title and to make provision for younger children.

The MASTER of the ROLLS expressed the following opinion :—

“ I am of opinion, that I cannot sanction the marriage of Sir *Courtenay Honywood* during his infancy, unless all his guardians concur in thinking it desirable that the marriage should take place during his infancy. Even with that concurrence, I should hesitate, whether I could with propriety give the sanction of the Court to the marriage during the infancy of the proposed husband. The evil likely to arise from the marriage being delayed for ten or eleven months does not (considering the age at which the intended husband and bride are now arrived) appear to me to be appreciable; but the advantages to be derived from this delay appear to me to be considerable. That alone to which I shall refer is the following :—As Sir *Courtenay Honywood* is the representative of an old family, and possessed of an hereditary title, it is, as it appears to me, desirable, that

on

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on his marriage, the family estates should be so settled that they may go with the title, and that provision should be made for younger children, or, at least, that this should be capable of being done, if the parties to the marriage contract and the families on both sides think it desirable. This is impossible if the marriage takes place during infancy. No settlement of the family estates to be then made would bind the husband, and, although it is true that he might, on attaining twenty-one, settle the estates in any manner that might be thought proper, still, as it would be a post-nuptial settlement, it would be voluntary and liable to be revoked, at any time afterwards, by a sale from Sir *Courtenay* to a purchaser or by his creditors.

“ But if the settlement be made on the marriage, and after Sir *Courtenay* has attained twenty-one, no purchaser or creditor could afterwards disturb it.

“ The improbability that Sir *Courtenay* should ever hereafter so act as to permit the family estates and the provision for his children to be dissipated does not appear to me to be sufficient to overcome the apprehension which the Court ought to feel from the possibility of such an event, and which must be followed in other cases, if adopted in this. I think that the Court ought, so far as it can, to guard against the possibility of the occurrence of such a calamity.”

On the 8th *May*, 1855, the matter was heard on appeal by the Lords Justices, when it was arranged that it should be heard by the full Court.

The

The Lord Chancellor and Lords Justices ordered the matter to stand over until the bill pending in Parliament (a) had passed, enabling an infant to make a settlement of his real estate. Shortly after which the marriage took place.

(a) 18 & 19 Vict. c. 43.

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 May 26.

HATCH v. SKELTON.

CAROLINE SKELTON was seised of two-thirds of certain freeholds, subject to a mortgage in fee thereof, vested in *Joseph B. Angell*, to secure the sum of 1,300*l.* *Caroline Skelton* was also seised of the other one-third of the freeholds, which was not included in the mortgage. At her death, she also possessed some leaseholds. By her will, dated in *August*, 1848, she devised and bequeathed to *Joseph B. Angell* all her real and personal estate for his absolute use and benefit, subject, nevertheless, in the first place, to the payment of the debt of 1,300*l.* and interest due to him, and all other her debts and her pecuniary legacies, and she appointed him her executor. After her death, *Joseph B. Angell*, in *November*, 1849, proved her will and paid all the legacies and the debts, except his own mortgage debt. In the residuary account, rendered by him to the Commissioners of Stamps, in *May*, 1850, he represented the balance of the estate as being 467*l.* He added :—"The executor will appropriate this balance towards payment of the mortgage of 1,300*l.* due to himself."

May 6, 7, 8.
A., the owner of a freehold estate, subject to a mortgage in fee to secure 1,300*l.*, devised and bequeathed his real and personal estate to *B.* the mortgagee. *B.*, in his residuary account, stated, that he had retained 467*l.*, out of the personal estate, towards payment of his mortgage debt. Afterwards, *B.* devised the property to three relatives of *A.*, "provided they undertake to receive the same with all the liabilities attaching thereto." Held, first, under the circumstances, that the mort-

Joseph

gage had not merged in the fee ; and, secondly, that the three took the estate subject to the payment of the balance of the mortgage debt.

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Joseph B. Angell, by his will, dated in *September*, 1853, appointed the Plaintiffs his executors and trustees, and made the following bequest:—"It is my will and desire, that the wharf and several houses possessed by me under the will of the late *Caroline Skelton* shall be given and transferred, absolutely, to the persons undernamed, as tenants in common, *provided they undertake to receive the same with all the liabilities attaching thereunto.*" The persons undernamed were two sisters and a niece of *Caroline Skelton*.

On *Joseph B. Angell's* death, a question arose, whether the Defendants, the legatees under his will, were to take the property subject to or discharged from the mortgage debt.

By the direction of the Court, Mr. *Dignam*, the solicitor of the testator *Angell*, was examined *vivâ voce* at the hearing. He proved, that the testator had given him instructions, in *August*, 1850, to prepare a deed settling the property on the family of Miss *Skelton*, after payment of the mortgage of 1,300*l.* A copy of the instructions, written by *Dignam* and submitted to Counsel, was produced. The deed was prepared, but never executed.

The testator had in his lifetime stated his intention not to benefit by the gift to him by *Caroline Skelton*, but to restore the property to her relatives.

Mr. *R. Palmer* and Mr. *J. V. Prior*, for the Plaintiffs. First, whether the mortgage merged in the inheritance is a pure question of intention, to be determined by the acts and conduct of the testator. Here it is shewn that he intended to keep his mortgage debt alive, and to benefit the *Skelton* family only to the extent

tent of the benefit derived by him from *Caroline Shelton*. Secondly, the property being, at the death of the testator, subject to the mortgage, is directed to be "given and transferred" to them, subject to "all the liabilities attaching thereunto," and therefore necessarily subject to the mortgage. The Defendant takes the estate *cum onere*. They cited *The Earl of Clarendon v. Barham (a)*; *Byam v. Sutton (b)*.

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Mr. Roupell and Mr. W. H. Harrison, for the Defendants, the devisees. There can be no question on the will but that the devisees are to take, subject to "all the liabilities." The liabilities intended are the rent and covenants of the leaseholds and such, if any, liabilities, in respect of tenure, as the freeholds might be subject to, but had no reference to the mortgage, which had already merged in the estate; for the owner in fee, and the mortgagee being one person, he was incapable of having a debt owing from himself and charged on his own fee simple estate.

At law, the mortgage merged in the fee, and in equity it sunk into the inheritance, unless it can be shewn that it would be more beneficial for the owner to keep it alive. Here it was not. As to intention, to be collected from the acts of the testator, it is manifest that the object of the return to the Stamp Office was to escape the payment of legacy duty on the residue; besides this, the return itself shews, that all the legacies had been paid, and therefore that the debts, which were a paramount charge, had been satisfied. The testator never afterwards kept any account of the mortgage or of the interest, and he did no act to shew that a debt existed. As to the instructions for the deed, this was nothing

(a) 1 Y. & C. C.C. 688.

(b) 19 Beav. 566.

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nothing more than an intention to settle, which was never carried into effect, and which settlement might, at any time, have operated out of his absolute interest; this therefore cannot be relied on. They cited *Forbes v. Moffatt* (a); *Donisthorpe v. Porter* (b); *Lord Compton v. Oxenden* (c); *Grice v. Shaw* (d); *Swabey v. Swabey* (e); *Knight v. Davis* (f); *Marshall v. Holloway* (g).

The MASTER of the ROLLS.

May 7. I think there is sufficient evidence of the charge having been kept alive; I will read the evidence, and, if I think it necessary, I will hear the reply to-morrow.

The MASTER of the ROLLS.

May 8. I have looked at the evidence, and am of opinion that the debt is not merged in the estate. When a mortgagee becomes entitled in fee to the estate on which his mortgage is charged, the presumption, in the first instance and in the absence of evidence, is, that the mortgage has merged in the estate. These cases always depend upon the evidence of intention, and, in the absence of any direct evidence, the presumption is, that the mortgagee would do that which was most for his interest.

I think, in this case, that there is evidence, on the part of the mortgagee and devisees, of an intention to keep this charge alive. The evidence is distinct, that he intended to derive no benefit from the devise, but to return

(a) 18 Ves. 384.
 (b) 2 Eden, 162; 2 Amb. 600.
 (c) 2 Ves. jun. 263; 4 Bro. C. C. 397.

(d) 10 Hare, 76.
 (e) 15 Sim. 106.
 (f) 3 Myl. & K. 358.
 (g) 5 Sim. 190.

return everything to the relations of *Caroline Shelton*. He proposed to effect his intention by deed, but he did it by will. That he intended to give the property to the relations is clearly established, and the evidence as to keeping alive the mortgage is distinct. In the first place, there is the residuary account passed at the Stamp Office, in which he makes the balance 467*l.*, and states he will retain it in payment of his mortgage of 1,300*l.* on the property. The evidence is, therefore, distinct, that he intended so to apply it. It has been argued, that this was done merely for the purpose of avoiding payment of legacy duty on that sum, to which he would have been liable, if the mortgage did not exist. Assuming this to be so, it would only shew one of his motives for keeping the charge alive. What he stated was this:—"The executor will appropriate this balance towards payment of the mortgage of 1,300*l.* due to himself." He says, "towards payment" of it, and therefore the balance of the mortgage debt still remained due to him.

Another proof of his intention is the evidence of *Dignam*, his attorney, to whom he gave instructions to prepare a deed, by which the property derived from *Caroline Shelton* was to be settled on her relations. In the instructions for the deed, which are in writing, he expressly states his wish to secure the property to the family of Miss *Shelton*, after payment of the mortgage debt of 1,300*l.*, and all other debts and expenses. He could not have given such instructions, unless he considered that the charge was in existence at the time, and this, therefore, is positive evidence to shew that he considered it then alive.

The expression in the will is ambiguous, viz. to take the property "with all the liabilities attaching thereunto."

The

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The leaseholds were no doubt subject to some liability, but if he had omitted this expression altogether, the devisee would still have taken them subject to the burden of the covenants, to the payment of the rent and to the obligation to repair. The word "liabilities" may apply to the mortgage debt also, and he uses it generally. I think that the conduct of the testator and these two documents are conclusive to shew, that he intended to keep the charge alive, and that he intended to give to his devisees the property *minus* the charge.

The sum of 467*l.*, which he treated as retained, must go in part discharge of the mortgage debt.

RE The GREENWICH HOSPITAL IMPROVEMENT ACT.

May 7, 8.

A testator "gave" to his wife, for her use and benefit, "his leases, moneys, goods, furniture, plate, book debts, securities for money and all other property, of every description, that he might be possessed of." Held, that the real estate passed.

THE testator, by his will, dated in 1843, expressed himself as follows:—"I give and bequeath to my dearly beloved wife, *Ann Phillips*, for her use and benefit, my leases, moneys, goods, furniture, plate, book debts, securities for money, and *all other property of every description that I may be possessed of at the time of my decease.*" And he appointed his wife and brothers his executors.

After the testator's death, a part of his real estate was taken under the above Improvement Act, and the purchase-money was paid into Court. *Mrs. Phillips* now petitioned for payment of the fund to her, and the question was, whether the real estate passed to her by the will.

Mr.

Mr. *C. M. Roupell*, in support of the petition. This is a gift to the widow of all "property of every description," and "for her absolute benefit." The word "property" has the most extensive operation, and includes real as well as personal estate. Like the word "estate," it *prima facie* includes freeholds; *Fullerton v. Martin*(a); *Patterson v. Huddart*(b); *Jongsma v. Jongsma*(c); *Dunnage v. White* (d).

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Mr. *Allnutt* *contrâ*. The real estate did not pass by this will. The testator uses the word "give," and not the proper technical word "devise," and gives the property "he is possessed" and not that which he is "seised" of. Even the word "estate," which is more applicable to real estate, may be restricted by the context; *Woollam v. Kenworthy* (e); *Coard v. Holderness* (f); *Doe d. Spearing v. Buckner* (g). Here the general words, following the particular enumeration of personal estate of different descriptions, must be limited to property *ejusdem generis*.

The MASTER of the ROLLS: I will consider this case.

The MASTER of the ROLLS.

May 8.

In this case I think the words are sufficient to pass real estate.

In *Coard v. Holderness* (f), I held that real estate did

(a) 17 *Jur.* 778.

(b) 17 *Beav.* 210.

(c) 1 *Cox*, 362.

(d) 1 *Jac. & W.* 583.

(e) 9 *Ves.* 137.

(f) *Ante*, p. 147.

(g) 6 *Durnf. & E.* 610.

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did not pass, by a gift of "all estate, effects and property, whatsoever and wheresoever," because I thought the whole of the rest of the will was applicable to personal estate only, and that there were no words in the will applicable to real estate. Not merely was the limitation to the three trustees, "*their executors and administrators*," but all the various other clauses and expressions in the will evidenced an intention to deal with personalty only. That was the principle on which *Woollam v. Kenworthy* (a) and *Doe d. Spearing v. Buckner* (b) proceeded.

As I stated in *Patterson v. Huddart*, where the words are sufficiently large to pass real estate, the burden of proof lies on the heir, and it is for him to shew that the words do not include the real estate.

The words in the present case, it is true, are associated with many other words exclusively applicable to personal estate, which are sufficient to include every species of personal estate; the words that follow must apply to something beyond: and, not being applicable to anything else, I think they must pass the real estate.

(a) 9 Ves. 137.

(b) 6 Durn. & E. 610.

1855.

JEBB v. TUGWELL.

June 5.

IN this case, a decree had been made in a suit to carry into effect the trusts of a settlement (a); the decree declared the rights and directed inquiries and accounts.

A decree was made in the absence of an infant who was interested; nothing having as yet been done under it, and it appearing to be for her benefit, the Court made a supplemental order, under the 15 & 16 Vict. c. 86, s. 52, to carry on the decree.

After the decree had been passed and entered, but before anything had been done under it, it was discovered, that an infant *cestui que trust* had been born just before the hearing, and who had not been made a party to the suit.

Mr. Shapter now moved, under the 52nd section of the statute 15 & 16 Vict. c. 86, for a supplemental order that the decree might be carried on and prosecuted between the parties and the infant *Anna Louisa Jebb*, in like manner as if she had been a party to the suit at the date of the decree. He said, the Registrar and the Secretary of the Master of the Rolls, to whom an application for an order of course had been made, were of opinion, that application must be made to the Court. The question (he said) is, whether the order required is the usual supplemental order? The old practice, in such cases, was, to file an original bill in the nature of a supplemental bill, asking a decree to bind the infant, and, in a very plain and simple case, as where a decree had been recently made and no account or proceedings in the Master's office had been taken in the absence of the infant, the Court would, in the first instance, make a decree, "that the decree in the original cause and the accounts and inquiries

(a) *Ante*, p. 84.

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inquiries thereby directed, should be carried on ~~and~~ prosecuted between the parties to the second, or ~~sup~~plemental suit, in like manner as the same were directed between the parties to the first or original suit;" *Egremont v. Thompson* (a). But if accounts had been taken in the absence of the infant, the order, in the first instance, was, for an inquiry whether it would be for the benefit of the infant that he should be bound by the decree and proceedings, and on that being reported the affirmative, a decree was made, that the suit should proceed against the infant; *Egremont v. Thompson* (b); *Burton v. Monro* (c); *Brookfield v. Bradley* (d); or decree that the accounts should be taken over again with liberty to the Masters to adopt the accounts previously taken; *Baillie v. Jackson* (e).

In this case, the decree has been recently made, and it is within the recollection of the Court, that the decree is such as to be fit and proper that the infant should be bound by it. The only case under the statute touching the subject is *Fullerton v. Martin* (f). There the Vice-Chancellor *Kindersley* doubted whether a decree to bind an infant not party to the proceedings was a common decree within the 52nd section, but, it being made to appear that no proceedings whatever had been taken since the birth of the infant, the common order was made (g).

He submitted, that as the hearing was in the absence of the infant, it was proper to notice the case to the Court

(a) Vice-Chancellor of England, February 9, 1849.

(b) Vice-Chancellor of England, March 20, 1850.

(c) Vice-Chancellor Knight Bruce, January 19, 1850.

(d) *Seton on Decrees*, p. 606

(2nd edit.)

(e) 10 Sim. 167.

(f) *William's Practice*, 51 *Seton on Decrees*, p. 606 (2nd edit.)

(g) 1 Drew. 238.

Court; but that as nothing had been done since the decree, and the Judge's memory supplied him with the facts establishing that it was fit and proper to bind the infant, the common order might be made in the first instance.

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JESS
v.
TUOWELL.

The MASTER of the ROLLS, upon reading the decree, and it appearing to be for the infant's benefit that she should be bound by the decree, made the order.

STEPHENS v. GADSDEN.

UNDER the settlement, made in 1827, on the marriage of Mr. and Mrs. *Gadsden*, a sum of 7,500*l.*, 3*l.* per cents. (in the event which happened after the decease of their parents) was held in trust for all and every, or such one or more, exclusively of the others, of the children of the marriage or the issue of such children, in such parts, &c. as Mr. *Gadsden* should, by deed or will, appoint, and in default of appointment, the fund was to be held in trust for all the children of the marriage, &c., equally, &c. Mrs. *Gadsden* died in 1847, and there were five children of the marriage, viz. *Henry, Frederick, Eliza, Emily* and *Grace*.

May 8.
A testator, by virtue of a power, appointed a fund to trustees for his four children, in four equal portions and subject to the trusts therein-after contained respecting his own residuary estate. Some of those trusts were to the children for life, with remainder to their children, and (as regarded the fund subject to the power) the appointment to grandchildren was void for remoteness.

In 1850 Mr. *Gadsden* made his will, whereby, after giving to his son *Henry* 200*l.* and an annuity of 68*l.*, and declaring that he should take no interest in the settlement fund, and after referring to his power to appoint,

Held, that the children took absolutely in the first instance, and that the subsequent attempt to limit the absolute gift being void, the children took the fund absolutely.

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appoint, he bequeathed the 7,500*l.* to his executors, ~~██████████~~ trust for his four children, *Frederick, Eliza, Emily* and ~~██████████~~ *Grace*, in four equal portions, and subject to such trusts ~~██████████~~ and powers as were thereafter contained respecting ~~██████████~~ the residue of his estate.

The testator then gave one-fourth of his own residuary real and personal estate to his son *Frederick*, and one-eighth thereof upon trust for each of his daughters *Eliza, Emily* and *Grace*, and another eighth to his daughter *Eliza* for life for her separate use, and after her decease on certain trusts for her children, and, in case there should be no person in whom this last-mentioned eighth part should become absolutely vested, under the trusts thereinbefore declared, then on trust for his daughter *Eliza*, her executors, administrators and assigns. And he made similar dispositions as to two other eighths in favour of his two other daughters and their children.

By a codicil to his will, dated in *July*, 1853, the testator gave a legacy of 5,000*l.* to his son *Frederick*, instead of the legacy of one-fourth part of the residuary estate bequeathed to him by the will, and in the event of the clear residue of his estate realizing less than would give to each of his children (other than *Henry*), the sum of 5,000*l.*, then he directed that the legacy given to *Frederick* should be reduced to such less sum; and he declared, that one half of the sum or share of the residue which he bequeathed to his daughters should be settled for the separate use of each of his daughters, instead of one-eighth; and he thereby declared, that his son *Frederick* should take no interest under his marriage settlement, it being his intention to give him the legacy of 5,000*l.* in lieu of all interest in
 the

The sums and trust funds thereby settled, which he intended to go to his three daughters with his residuary estate.

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STEPHENS
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The testator died in 1853, leaving his five children surviving him. Neither of his daughters had then been married, and the appointment to their children, under the power contained in the marriage settlement, was too remote and invalid.

Questions were raised whether the will and codicil contain a valid and effectual appointment of the funds comprised in the settlement of *January*, 1827, and if invalid, then whether *Henry* and *Frederick Gadsden* were bound to elect between the benefits given by the will and their share of the trust fund. Questions were also raised as to the share and interest in the testator's estate to which the testator's daughters were respectively entitled under the will and codicil, and whether, in estimating the legacy given by the codicil to *Frederick*, the trust funds comprised in the settlement of 1827 ought or not to be brought into the account.

The Defendant *Henry Gadsden* was out of the jurisdiction, and no one appeared for him.

Mr. *R. Palmer* and Mr. *Cotton*, for the Plaintiffs. The limitations to the issue of the daughters, made by the testator in exercise of his power, are too remote and void, but the appointment to the daughters is perfectly valid, and confers on them, in the first instance, an absolute interest in the fund. The subsequent attempt to restrict the mode of enjoyment is wholly void, and the prior absolute gift therefore remains; *Blacket v.*

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Lamb (a); *Carver v. Bowles* (b); *Monypenny v. Der-*
ing (c); *Kampf v. Jones* (d); *Lassence v. Tierney* (e);
Campbell v. Brownrigg (f); *Arnold v. Congreve* (g).
 But if not, and the appointment is to be looked upon as
 a direct appointment to the void uses, then *Frederick*
 and *Henry* are bound to elect, between the benefits
 given them by the will and the shares in the trust fund
 to which they may be entitled, in consequence of the
 failure of the appointment. The only remaining ques-
 tion is as to how *Frederick's* share is to be computed
 that is, whether the shares under the settlement are to
 be taken into account.

The MASTER of the ROLLS. My impression is, they
 were meant to be as nearly as possible equal.

Mr. Fleming, in the same interest, relied on the gift
 over, in case there should be no person in whom the
 one-eighth should become absolutely vested.

Mr. Ferrers for *Frederick Gadsden*.

Mr. Bagshawe, Junior, and *Mr. J. H. Palmer*, for the
 trustees of the settlement of 1827, contended that the
 appointment to the daughters for life was valid, but was
 void as to the limitations over. That this was not the
 case of an independent absolute gift, with a subsequent
 invalid qualification, but one where the qualification
 was inseparable from, and formed the essence of the
 gift itself. They cited *Lassence v. Tierney* (e), and
Campbell v. Brownrigg (f).

Mr.

(a) 14 *Beav.* 482.

(b) 2 *Russ. & Myl.* 301.

(c) 15 *Jur.* 1050.

(d) 2 *Keen*, 756.

(e) 1 *Mac. & G.* 551; 2 *H. &*

Tw. 115.

(f) 1 *Phill* 301.

(g) 1 *Russ. & Myl.* 209; *Tam-*
lyn, 347.

Mr. Taylor for one of the executors of the testator's will.

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I regret that no one appears for *Henry Gadsden*, for I should have been more satisfied if he had been heard; but as the trustees have raised the argument, I must express my opinion, which is, that the case comes within *Carver v. Bowles* (a), which I followed in *Blacket v. Lamb* (b). The appointment of the trust fund and the disposition of the residuary real and personal estate are distinct. The testator appoints the whole of the settled fund to his executors in trust for his four children *Frederick, &c.*, in four equal portions, and subject to the trusts and powers thereafter contained respecting the residue of his estate. Where a testator has a power to make an appointment there are two things to be considered, first, who are the objects of the power, and, secondly, how they are to take the fund. Here the four children, and they only, in the first instance, are appointees, but afterwards, by reference to the trusts respecting the testator's own residuary real and personal estate, other objects and other limitations are superadded. It would have been different if he had originally appointed to the children for life and afterwards to their children. *Blacket v. Lamb* (b) was something like this case; for there, the testator duly appointed a fund in favour of objects of the power, absolutely, and he also bequeathed to them his own property, especially requesting them to leave the appointed fund to persons not objects of the power. That might have raised a precatory trust, but could not be an appointment under the power in favour of the

(a) 2 Russ. & Myl. 301.

(b) 14 Beav. 482.

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the children of the objects of it. It is extremely likely that the testator may have had a similar intention here, for, having appointed the fund to the four children equally, he says, "and subject to the trusts of my residuary estate," part of which he directs to be settled on his daughters, with remainder to their respective children. That is, in the first place, he appoints the fund to his four children, and afterwards he adds directions as to the manner in which part of these shares is to be held, but which, being invalid, have no effect in cutting down the previous absolute gift.

I think this case comes within the principle of *Carver v. Bowles* and *Blacket v. Lamb*, and that the superadded trusts may be struck out of the will as invalid, leaving the absolute gift, which is good, untouched, in the same manner as in cases coming within the provisions of the *Thellusson Act* (39 & 40 Geo. 3, c. 98), in which you deal with the invalid direction to accumulate as if the clause were struck out of the will. I deal with this case in the same manner, and as if this invalid trust had been struck out of the will, and I treat it in the same way as if the power had been simply and absolutely executed in their favour. I will make a declaration to that effect.

NOTE.—See *Gerrard v. Butler*, *post*, page 541.

1855.

GARDNER v. GARRETT.

ON the 13th of *April*, a decree was made for the administration of the estate of the deceased. On the next day, notice was given to a creditor, who was proceeding at law for the recovery of his debt. Instead of suspending the proceedings in the action he went on.

Mr. *Jessel* moved for an injunction to restrain the action at law. He asked, that the creditor might pay the costs of the motion; *Graham v. Maxwell* (a).

Mr. *Terrell*, *contra*.

The MASTER of the ROLLS.

I am of opinion, that the creditor must pay the costs of this motion; but he may set them off against his costs of the action up to notice of the decree.

(a) 1 *Mac. & Gor.* 71.

May 8.
A creditor having continued his proceedings at law after notice of a decree for administration, was ordered to pay the costs of a motion to restrain him, but was allowed to set them off against the costs of the proceedings at law incurred prior to the notice.

NOTE.—See *Beauchamp v. The Marquis of Huntley, Jacob*, 546.

1855.



SHARP v. COSSERAT.

May 24.

Funds were, in 1823, settled on a wife for life, with remainder to the husband "until" he should "make any composition with his creditors for the payment of his debts, although a commission of bankruptcy should not issue against him." In 1842, his principal creditors agreed to take a composition on their debts secured by bills. The wife died in 1852. Held, that the composition, though not made with the whole of his creditors, and was made during the wife's life, and did not affect the trust property, nevertheless operated as a forfeiture of the husband's interest.

ON the marriage of Mr. and Mrs. *Cockram*, in 1823, a settlement was executed, under which a sum of consols, which belonged to the intended wife, was settled on Mrs. *Cockram* during the joint lives of herself and Mr. *Cockram*; but if she should die in his lifetime (which event happened), upon trust to pay the dividends of the said trust monies unto Mr. *Cockram* "and his assigns, or permit and suffer him and them to receive the same during his life, or *until* he should commit any act of bankruptcy within the intent and meaning of any statute or statutes made or to be made relating to bankrupts, whereupon a commission should issue or he should be found or declared bankrupt, or *make any composition with his creditors for the payment of his debts*, although a commission of bankruptcy should not issue against him, or until he should make any assignment of his effects for the benefit of his creditors, or take the benefit of any" Insolvent Act. And from and after the death of *John Cockram*, "or his committing any act of bankruptcy," &c., "or making any composition with his creditors for the payment of his debts," &c., then the whole of the said trust monies were to be held upon trust for the children of the marriage equally.

There were three children of the marriage. Mrs. *Cockram* died in 1852, but in the meantime, and in 1846, Mr. *Cockram* had fallen into pecuniary difficulties, and his principal creditors, eleven in number, signed a deed, whereby, "in consideration of a composition of 10s.

in

in the pound on the amount of their respective claims, paid to them by four equal instalments of 2*s.* 6*d.* each, at four, eight, twelve and sixteen months, in discharge of the several demands on him," they released Mr. *Cockram*, his heirs, &c., "from all demands whatsoever which they had against him." The composition was secured by bills accepted by his brother, which were paid.

1855.

 SHARP
 v.
 COSSERAT.

This present suit was instituted by one of the children, and the question was, whether Mr. *Cockram* had or had not forfeited his interest in the trust funds by the composition with his creditors in 1846.

Mr. *Follett* and Mr. *Southgate*, for the Plaintiff. The defences raised are, first, that the composition, being made during the life of the wife, was ineffectual to work a forfeiture; and, secondly, that the amount of composition was not paid out of or charged upon the settled fund, so as to incumber or affect it. The answer is this:—If the husband had become bankrupt during the life of his wife, his future interest would not have been transferred to the assignees, but would have ceased; it, therefore, can make no difference, that the act of forfeiture was by a composition in her lifetime. As to the second, nothing is said as to charging the trust fund with the composition payable to the creditors, the real intention being, that the necessity of compromising with his creditors should be the test and proof of his insolvency, and in that case the trust fund was to go over to the children. In *Manning v. Chambers* (a), funds were settled on *E. M.*, "until he should become bankrupt." It turned out that he was, at the very time, an uncertificated bankrupt, and the Court held, that his interest

(a) 1 *De G. & Sm.* 282.

1855.

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v.
COSSEBART.

interest had ceased, for the object of that settlement was to provide, that the income should be received by the children rather than by the assignees.

Mr. *J. V. Prior*, for trustees of the settlement.

Mr. *Biron*, for a mortgagee of a child's share.

Mr. *Rasch*, for the trustees of the settlement of a child. This was a contract between the husband and wife for valuable consideration, and she has stipulated, that on a certain event occurring, her children shall have the fund. That event has happened. He cited *Brandon v. Aston* (a); *Kearsley v. Woodcock* (b).

Mr. *R. Palmer* and Mr. *Dickinson*, for Mr. *Cockram*. First, this is not a composition with creditors within the meaning of the deed; and, secondly, having taken place in the wife's lifetime, it does not operate as a forfeiture. Clauses of forfeiture are construed with the greatest strictness, and here the "composition with his creditors" means a deed of composition with all his creditors, conveying the whole of his property to trustees for the benefit of his creditors, and, in fact, superseding the necessity of having recourse to the Courts of Bankruptcy and Insolvency. Unless the composition amounted to an act of bankruptcy, which put the life estate in peril, it was no forfeiture. The test is this: Would an agreement by two small creditors to take a portion of their debts in lieu of the whole be a forfeiture? Surely not.

Secondly, the payment is to be "*until*," which implies that his interest is to begin and end; but the event cannot happen before the beginning of his estate, and it is

(a) 2 Y. & C. C. C. 24.

(b) 3 Hare, 185.

is an unintelligible and irrational meaning to attribute to the parties to the settlement, that an act which does not affect his life-interest in the fund and is for the benefit of his children themselves, should operate as a forfeiture. The contingency runs through the whole limitation.

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SHARP
v.
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The MASTER of the ROLLS.

On both points I am in favour of the Plaintiff. In the first place, I am of opinion, that this is a composition with his creditors within the terms of the deed. The dividends are to be paid to Mr. Cockram until one of these five events—[His Honor stated them.] That this is a composition with creditors nobody can doubt; but it is contended, that it was not a forfeiture, because it was not of such a nature that a commission could have issued upon it, it not being an act of bankruptcy. It appears to me, that the very thing is provided for by the deed, for the interest is given until he shall “make any composition with his creditors for the payment of his debts, although a commission of bankruptcy should not issue against him.” Am I to consider it as if the words were a composition “on which a commission might though it has not issued?” I think not, and that the very case is provided for. *Manning v. Chambers*, if anything, was a stronger case than the present, for there, by a voluntary deed, certain funds were assigned to the husband until he should commit an act of bankruptcy; he had committed one before the deed had been executed, and was uncertificated, and the Court held, that he had no interest in the funds. The object was not so much to forfeit the interest of the husband, as to accelerate the wife’s estate.

Here interests were limited in succession to the wife,
the

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the husband and the children; and the intention was, if the husband committed an act of bankruptcy, or made a composition during the life or after the death of his wife, to bring forward and accelerate the estate to the children. The result is, that when the Defendant, Mr. *Cockram*, made a composition with his creditors, the rights of the children became accelerated, and, on the death of their mother, they became entitled to the property.

May 25.

June 11.

ASPLAND v. WATTE.

Bequest to *A.* for life of an annuity of 100*l.*, "by interest arising out of money to be vested for that purpose by the executors" in public funds or other good security, and after his death, "the said capital stocks so purchased" to *A.*'s children. By a codicil the testator said,

"what I mean in my will by securing money in the public funds, is to purchase a capital stock" in the consols by my executors. Held, that the executors might either purchase in the consols or in other good security, but having done neither in the life of *A.*, his children were entitled to 3,333*l.* 6*s.* 8*d.* consols, and not to 2,000*l.* cash.

In the above case, *A.* died in 1813, and his children, on receiving 2,000*l.*, executed a release, which, after reciting, that according to the trust, 2,000*l.* had been set apart to answer the annuity, they released the representative of the testator from all claims and demands. In 1854, the children instituted a suit to recover the amount of consols which would be required to produce 100*l.* Held, that having regard to the situation in life of the Plaintiff, the inaccuracy of the recitals, and the absence of professional assistance, they were not barred by lapse of time.

in trustees for payment of the said annuity, or be it in money, shall be equally divided between such child or children of my said son *John* as shall be then living." The testator appointed *William Morton* and *John Compton* executors of his will.

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ASPLAND
v.
WATTE.

The testator made a codicil to his will without date, as follows:—"Note, what I mean, in my will above, by securing money in the public funds, is, to purchase a capital stock in the Consolidated Bank of *England* Annuities, by my above-named executors, *William Morton* and *John Compton*."

The testator died in 1809, and on the renunciation of the two executors, letters of administration were granted to *Abraham Watte*, the residuary legatee. It did not appear that any investment had been made to secure the annuity, but it was duly paid by *Abraham Watte* to *John Watte*, during his life. He died in *September, 1843*, leaving the Plaintiffs, *Mary Ann* and *Elizabeth*, his only children, him surviving, and thereupon *Abraham Watte* paid to each of them 970*l.* 6*s.*, being half the 2,000*l.*, minus the legacy duty and expenses. They executed a release, dated 6th of *October, 1843*, whereby, after reciting the above stated clause in the will, but making no allusion to the codicil; and reciting the renunciation of probate by the executors, and the grant of letters of administration to *Abraham Watte*, and that he "proceeded to execute the duties and trusts directed in and by the said will, and particularly he, *Abraham Watte*, set apart, out of the assets of the testator, the sum of 2,000*l.*, to meet, answer and pay the annuity of 100*l.* to the said *John Watte*, the testator's eldest son, as directed by the will," and which annuity he paid to *John Watte* till his death; and reciting the death of *John Watte*, leaving *Mary Ann* and *Elizabeth*, his only children,

1855.

 ASPLAND
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children, him surviving, who thereupon "became entitled, in equal moieties, to the sum of 2,000*l.* money so set apart to answer and pay the said annuity of 100*l.* to," &c., it was witnessed, that in consideration of the sum of 990*l.* paid to *Mary Ann* and *Elizabeth*, "as and in full of their several and respective moieties, parts and shares of the trust sum of 2,000*l.* so set apart to answer and pay," &c., after deducting the legacy duty thereon, the receipt whereof was thereby acknowledged, *Mary Ann* and *Elizabeth* jointly and severally released and discharged *Abraham Watte*, his heirs, &c. "from all further or other claims or demands whatsoever, for or in respect of their said several moieties, half parts and shares of and in the reversionary legacy of 2,000*l.* money, or other property whatsoever given and bequeathed and intended to be given and bequeathed by the will of the testator, *John Watte*, to or for," &c.; with a general release "of and from all further and other accounts, reckonings, actions, suits, controversies, claims or demands whatsoever in respect of the said reversionary gift, bequest or benefit given or intended to be given by the testator, *John Watte*, by his will to or for the said lawful children of the said *John Watte*, his son, living at the time of his death as aforesaid, or otherwise howsoever."

Abraham Watte died in *November*, 1852, and his will was proved by the Defendant, *Margaret Watte*.

The release or deed poll of the 6th of *October*, 1843, was executed by *Mary Ann*, then the wife of *John Dimmock Aspland*, and also by *John Dimmock Aspland*. *Elizabeth Watte* was then a spinster, but was now the wife of *William Drew*.

The Plaintiffs, Mr. and Mrs. *Aspland* and Mr. and Mrs.

Mrs. Drew, having discovered in the beginning of *January*, 1854, that they were entitled to the sum of **stock** directed to be invested to answer the annuity of **100*l.***, in the manner mentioned in the codicil, which fact, **as they** alleged, *Abraham Watte* had wilfully concealed from them, filed their bill on the 27th of *January*, 1854, **claiming**, notwithstanding the release, to be paid the difference between the value of the **stock** and the sums actually paid to them.

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Mr. Roupell and *Mr. Cottrell*, for the Plaintiffs. The release executed by the Plaintiffs in 1843 is no bar to the relief sought by this bill, for though general words are used applicable to every claim or demand which the Plaintiffs might have, yet, in construing such instruments, general expressions of this sort are limited by the recitals and context, which shew the object in view and the real intentions of the parties; *Payler v. Homersham* (a); *Lindo v. Lindo* (b); *Ramsden v. Hyllton* (c). But besides this, there are errors, misrepresentation and suppression on the face of the instrument, which renders it ineffectual, except as a receipt of the amount actually paid. Such settlements, made in error and under a mistaken notion of the parties' rights, have been repeatedly avoided in equity; *Millar v. Craig* (d); *Broderick v. Broderick* (e). If the real facts be concealed, even a family compromise is invalid; *Harvey v. Cooke* (f).

Secondly. According to the true construction of the will as explained by the codicil, the testator intended exclusively an investment in stock. It was therefore the duty of the legal personal representative to have invested

(a) 4 Maule & S. 423.
(b) 1 Bow. 496.
(c) 2 Ves. sen. 305.

(d) 6 Beav. 433.
(e) 1 Peere Wms. 239.
(f) 4 Russ. 34.

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invested a sufficient sum in consols to produce 100*l.* a year, and having neglected to do so, he became liable to the Plaintiffs for the amount of stock, and not for the 2,000*l.*; *Byrchall v. Bradford* (a); *Pride v. Fooks* (b). But even if he had an option to invest in consols or real security, he is still answerable in stock; *Dimes v. Scott* (c); *Watts v. Girdlestone* (d); *Marsh v. Hunter* (e); *Ames v. Parkinson* (f).

Mr. *R. Palmer* and Mr. *Cole*, *contra*. The will gives an option of investing either in the public funds or other good security, and in the codicil, the testator merely explains that by "public funds" he meant "*consols*," the option therefore remains. Whatever doubt might have formerly existed, the case of *Robinson v. Robinson* (g) has finally determined, that where a testator directs his trustees to invest trust monies in parliamentary stocks or funds, or on real securities, and they omit so to invest it, the *cestuis que trust* have not the option of charging them with the monies which would have been produced if the monies had been invested in the funds, but are only entitled to have the trust monies replaced, with interest at 4*l.* per cent.

The release is a complete bar to the present demand. It was executed twelve years ago, and where the parties have acted on a particular construction of a doubtful instrument, this Court is most reluctant to disturb a settlement or compromise entered into on that foundation; *Clifton v. Cockburn* (h). The lapse of time which has intervened, the laches of the Plaintiffs, and the deaths

(a) 6 *Madd.* 13, 235.(b) 2 *Beav.* 430.(c) 4 *Russ.* 202.(d) 6 *Beav.* 188.(e) 6 *Madd* 295.(f) 7 *Beav.* 379.(g) 1 *De G. Macn. & Gor.* 247.(h) 3 *Myl. & K.* p. 100.

of the only parties who could have satisfactorily explained the matter, and who most probably would have proved that the 2,000*l.* had been really set apart, are sufficient to induce the Court to refuse to disturb the existing final settlement.

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Mr. Roupell, in reply.

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I will read the will and the answer of the Defendant before I dispose of the case, and I reserve my opinion on the effect of the codicil; but there are one or two points material to observe upon on this occasion. It is obvious, that *Robinson v. Robinson* and that class of cases, where a sum of money is given to trustees or executors to invest either in consols or on real securities, do not apply to a case where they are directed to invest such a sum of money as will produce a given amount of annuity.

If this bill had been filed against *Abraham Watte* in 1844, instead of against his representatives in 1853, the case would be extremely different. The Plaintiffs might, at any time during the life of *John Watte*, have come forward and insisted on an investment: if they had done so in *Abraham Watte's* lifetime, and it appeared that the money had not been invested, he could not successfully have contended that he was only bound to invest such a sum as would, after the death of *John Watte*, produce 100*l.* a year. He would have been compelled to make such an investment in real securities or in consols as would have produced 100*l.* a year for *John Watte* for life, and secured the capital to the children on his death. He would not have been permitted to take advantage of his own breach of trust.

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If *John Watte* had died, the effect of his death would not have deprived the persons entitled in remainder of their right. If *John Watte* were alive, the trustee would have to purchase stock sufficient to produce 100*l.* a year, but if he were dead, the trustees could not say, "I am only bound to pay such a sum of money as would at any time purchase 100*l.* a year." If, however, *Abraham Watte* had proved that he had invested the money on other securities, which had produced and was then producing 100*l.* a year, that would be an answer to the claims of the Plaintiffs.

The lapse of time is very material. As against *Abraham Watte*, I should call on him to prove the investment, which it might be difficult for him to prove after a great lapse of time: at the same time, it is the duty of trustees to keep evidence of their dealings in respect of their trust. It is with respect to the evidence, on this part of the case, that I wish to reserve my opinion.

I think the release cannot be considered as a bar. It was given to a trustee by his *cestuis que trust*, persons in a humble condition of life, not likely to be very conversant with the subject, having no information as to their rights, and no independent professional assistance; and though I at all times feel inclined to give weight to the objections arising from lapse of time, I think I cannot treat this release as of any greater value than a receipt for the money then actually paid over.

June 11.

The MASTER of the ROLLS (after stating the circumstances of the case):—

...that the executor had power to in-

vest in the funds or real securities, and although I had some hesitation at the hearing, I have come to the conclusion that he had the power to invest in either, provided the securities were ample and sufficient to produce the 100*l.* a year.

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The annuity was paid to *John* until his death in 1843, when he died, leaving two children, who are Plaintiffs in this case. Within a month afterwards, *Abraham* paid each of these children 970*l.*, and they then executed a release, which was to this effect:—[*His Honor stated it.*]

The first question is as to the validity of this transaction. If the Court should be of opinion that these children have not had their full rights, then the next question is, what effect the lapse of time has on the transaction which took place in 1843, while the bill was not filed until the beginning of 1854. I first consider the question of construction of the will, and, in that view of the case, I am of opinion that the Plaintiffs were entitled to more than the 2,000*l.*; that is on the evidence now before me. Having come to the conclusion that, according to its true construction, the will gave power to the executors to invest the money either on real security or in consols, it follows, that if they had *bonâ fide* invested 2,000*l.* on real securities which produced five per cent., they would not be liable for more than the sum so invested. But, on the evidence now before me, I am of opinion that they did not make any such investment, and none being made, the *cetuis que trust* had a right, at any time, to insist on having an investment made.

This is distinguishable from the cases before Lord Langdale. Those were cases where executors were ordered

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ordered to invest either "*in the funds or on real securities,*" and the interest was payable to one for life, and afterwards to other persons. The Courts have ultimately held, that the executors are only liable for the amount of the money and not for the stock. The same result would take place in the converse case if the funds had fallen; there the executor would not be entitled to compel the legatee to take so much consols as would have been bought had the legacy been so applied, but which would not now produce the same amount.

I am of opinion, that in this case the *cestuis que trust* were entitled to the amount of an investment to produce 100*l.* a year. The amount could only be ascertained by actual investment, and the trustee not having thought fit to make one, the *cestuis que trust* have a right to come and insist on it. The case I put during the argument illustrates the view I take of the case. If the Plaintiffs had, during the life of their father, filed a bill to have a sufficient sum invested to pay the annuity and for securing the amount due to them on his death, then, as the trustee had made no investment, the Court would have ordered an investment to be made, and, as the trustee had made no selection, would have selected consols.

If the father had died immediately after the bill had been filed, the result would have been the same, as the trustee had not performed his duty. I am of opinion, in this case, that though the tenant for life died, the Plaintiffs are entitled to have the amount required to produce 100*l.* divided between them.

That being so, I am of opinion (assuming the case to be recent) their rights would be the same now, and that  
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if *Abraham Watte* had been a Defendant to this suit, he would be bound to pay the amount necessary to make the investment, and he not having made any, the Plaintiffs would be entitled to so much consols as would have produced this annuity.

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The case is embarrassed by reason not merely of the length of time, but of the circumstance that the bill was not filed till after the deaths of *Abraham Watte* and of the solicitor engaged in the matter. Under ordinary circumstances, I should consider this to be a bar to the claim; but the Plaintiffs were in a humble station of life, and had no professional assistance; the facts were not accurately represented, nor was the release explained to them at the time. I think that their rights are not barred by what has occurred, but the executor ought to have liberty to shew that the money has been invested. I should have required *Abraham Watte* to shew that it had been invested in good and sufficient security, for he ought to have preserved evidence of his dealings with these trust monies. I think from the answer, that the Defendant would not now be able to shew it. It appears reasonably clear that no such investment did take place, and although I will direct an inquiry, if asked, yet if it should turn out that none was made, the Defendant will have to pay the costs of the inquiry. Subject to that I must declare, that it appearing that the fund was not invested by *Abraham Watte*, the Plaintiffs are entitled to the value of so much consols as would have produced 100*l.* a year; that of course is 3,333*l.* 6*s.* 8*d.* consols. I shall make the decree without costs; but if the suit had been against *Abraham Watte* himself, and he had not proved a proper investment, I should have made him pay the costs.

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## STAINES v. GIFFARD.

June 11, 12.

When it is asked that small sums may be paid out of Court, to the solicitor of the parties entitled, the Court requires the production of their written consent. In a case where the consent was signed by eleven out of twelve of the parties, and the twelfth was in *America*, the Court dispensed with his signature, on the solicitor's undertaking to pay over the amount.

**M**R. *W. H. Clarke* appeared in support of a petition for payment, out of Court, of some small sums to the solicitor, the solicitor undertaking to pay them over to the parties entitled.

*The MASTER of the ROLLS.*

June 12

In this case, the order may be taken for the payment of these small sums to the solicitor, he undertaking to pay them over to the parties entitled. The usual practice is, to require a document signed by the parties to be produced, expressing their wish that the amount should be paid to their solicitor. In this case eleven out of twelve have signed such a paper, and the twelfth is resident in *America*.

Under these circumstances, I will dispense with the signature in this particular case, on the undertaking of the solicitor to pay the same over.

NOTE.—See *Kelsall v. Minton*, 2 Beav. 361; *Brandling v. Humble*, 48 Jur. 48; *Hawkins v. Dod*, 1 Hare, 146; *Middleton v. Young*, 17 Jur. 664; *Armstrong v. Stockham*, 11 Jur. 97.

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## FORSHAW v. HIGGINSON.

THIS case was argued by—

Mr. *R. Palmer* and Mr. *Bury*, for the Plaintiff.  
They cited *Greenwood v. Wakeford* (a).

Mr. *Roupell*, Mr. *Prior*, Mr. *Follett*, Mr. *Smith*, Mr. *Dickinson*, for the Defendants.

Mr. *R. Palmer*, in reply.

The MASTER of the ROLLS reserved judgment as to costs.

5. The MASTER of the ROLLS.

In this case, the terms of the decree to be made were settled at the hearing, but I reserved my judgment, for the purpose of considering what ought to be done with respect to the costs of the suit.

This is a suit by a trustee, who prays that he may be discharged from the trusts of an indenture of the 21st of June, 1850, and that the trusts remaining to be performed may be duly performed, and offering to account. The rule on this subject is free from obscurity, the only difficulty is to apply it. It is quite settled, that a trustee

(a) 1 *Beav.* 576; and see *Coventry v. Coventry*, 1 *Keen*, *Howard v. Rhodes*, 1 *Keen*, 581; 758.

cannot safely effect his object by getting such co-trustee to appoint a new trustee in his place, under a power vested in him for that purpose.

May 2, 5.

A trustee cannot, from mere caprice, retire from the performance of his trust, without paying the costs occasioned. But circumstances arising in the administration of a trust which have altered the nature of his duties, justify him in leaving it and entitle him to his costs.

A trustee was desirous of retiring, and was justified in so doing, though from private circumstances; his *cestuis que trust* having prevented him retiring, he instituted a suit to administer the trusts. He was allowed his costs.

A trustee desirous of retiring, by reason of his want of confidence in his co-trustee,



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cannot, from mere caprice, retire from the performance of his trust, without paying the costs occasioned by that act. It is also quite clear, that any circumstances, arising in the administration of the trust, which have altered the nature of his duties, justify him in leaving it, and entitle him to receive his costs, but I think that to justify him in that course, the circumstances must be such as arise out of the administration of the trust, and not those relating to himself individually.

Here, the circumstances which, in my opinion, justified his saying, "I cannot proceed in the administration of the trust with my co-trustee," arose out of his private circumstances, not out of the administration of the trust. If therefore, on the application to the trustee to be discharged, his *cestuis que trust* had said, "you must pay the costs of the appointment of the new trustees," which would have been the mere costs of an endorsement on a deed, and he had refused to do that, I should not have supported the Plaintiff in instituting a suit, by giving him the costs thereby occasioned. But that is not the present case, which is one of a different description. In fact, the events which had occurred made it impossible, in my opinion, for the Plaintiff to feel that confidence in his co-trustee, which was necessary, although the reasons were of a private nature and not arising out of the trust. He made an application to the *cestuis que trust* to be discharged from the trust, and for a release in respect of his former proceedings. They stated, in answer,—“We cannot give you a release, because there is one matter in which we think you have committed a breach of trust.” His reply was a very proper one:—“Then give me a release in respect of all other matters relating to the trusts.” The answer is, “No, it is a matter of great importance, and we cannot relieve you from the trust.

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What could a trustee do under such circumstances? I am of opinion, that he could not properly have got rid of the trust by means of the power contained in the deed, for although it enabled the other trustee to appoint a new trustee in the place of a retiring one, still, if the Plaintiff, *William John Forshaw*, had retired from the trust, on the ground of want of confidence in his co-trustee, and had allowed that person, in whom he felt no confidence, to appoint another person, not only not sanctioned, but opposed and objected to by the *cestuis que trust*; although I do not say he would have been liable for any misconduct that might afterwards have been committed by the trustees, yet the Court would certainly have greatly disapproved of such a proceeding, and he would have rendered himself liable to great risks, such as no trustee should be called upon to incur. I think therefore he could not properly get rid of the trusts by means of the power of appointing new trustees contained in the deed.

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No person can be compelled to remain a trustee and act in the execution of the trust. As I have already stated, if the circumstances preventing his continuing to perform his duties arose from any act of his own, or anything relating to himself, I think he ought to pay the costs of the appointment of a new trustee; but if the persons upon whom the appointment of the new trustee depend (which, in my opinion, are the *cestuis que trust* in the present case) absolutely refuse to take any steps for that purpose, what is he to do? In my opinion, the only course he could take was, to say, that which every trustee may say, "I will apply to and have the trusts executed by the Court of Chancery, and I will ask to be discharged from the trusts as incidental to that relief." That, in fact, is what has taken place in this case. The Plaintiff, by his bill, seeks to have the trusts

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trusts of the indenture executed by the Court, and to be discharged from his office of trustee. The *cestuis que trust* appear to take the benefit of the suit, for they ask for an account against the Plaintiff and his co-trustee, which, no doubt, might have been given without the institution of the suit, and they are willing and are desirous to have two new trustees appointed. I cannot from the circumstance that the account might have been taken out of Court, say, that they have not occasioned this suit, for when the Plaintiff asked for a release (which of course must have been on passing his accounts), they said, "No, we object to one thing, we will not give you any release, you must remain a trustee." The Plaintiff then says, "If I am to remain a trustee I have no confidence in my co-trustee, and I must go to the Court and have the trusts administered there." This, in effect, is the prayer of the bill, it prays, that the Plaintiff may be relieved from being any longer a trustee of the indenture of the 21st day of June, 1850, jointly with the Defendant, *Henry Forshaw*, and that the trusts of the said indenture (so far as they still remain unperformed) may be carried into effect by and under the direction of this Court. That, if necessary, some person may be appointed a trustee of the said indenture, in the place or stead of the Plaintiff. That all proper accounts may be taken and directions given for carrying the above-mentioned purposes into effect. He does not pray an account against himself, but makes an offer to account, which is accepted, and the account will be taken accordingly.

I am of opinion, in the result, that I must treat this as an ordinary suit, for the administration of the trusts of an estate; and, as these persons are all interested in the fund, I am of opinion, that the costs of all parties must

must be paid as between solicitor and client out of the trust fund.

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I have a word to say with relation to the costs of the evidence which has been gone into between the Plaintiff and the Defendant, *Henry Forshaw*. I think that the Plaintiff was placed in a very difficult position with regard to this evidence. In the first place, if he had *not* gone into evidence it would have been said, that he had acted from mere caprice, and that although he had made certain allegations, there was no evidence of them. Therefore he went into this evidence. But the evidence is given not in respect of any relief prayed against the Defendant, *Henry Forshaw*, for no relief is prayed against him, and, in my opinion, properly, for I do not think the bill ought to have prayed relief against him. It was for the *cestuis que trust* to pray relief against him, and ask, either that he might be discharged from the trust, or that a new trustee might be appointed, because a trustee, particularly a retiring trustee, has no interest whatever in that matter. Well then, he has gone into evidence as against a Defendant, against whom he prays no relief, and against whom he can properly have no relief, in order to justify himself and to give a reason why he retired from the trust. I think that he was entitled to retire from the trust without referring to this matter, and that I cannot throw the costs of this evidence, (with respect to which the *cestuis que trust* had nothing to do, because they do not take issue on it,) on the trust estate. At the same time, I think there was considerable justification in the Plaintiff's going into evidence, and I do not think I can make him pay the costs of it. I cannot certainly make *Henry Forshaw* pay the costs, because as there was evidence affecting him, he was entitled to go into a defence on the subject, and I feel considerable embarrassment as to  
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this evidence, which, I have no doubt, the Plaintiff himself felt, when he framed his suit, but the result is, that under the peculiar circumstances of the case, I shall give no costs of the evidence on either side.

IN RE THE LONDON DOCK ACT.  
EX PARTE TAVERNER.

June 11, 21.

The acknowledgment of a deed by a married woman under the "Act for the Abolition of Fines and Recoveries" (3 & 4 Will. 4, c. 74), may be made after the deed is enrolled, and, if so made, will be valid.

A *feme covert*, tenant in tail, executed a disentailing deed on the 12th of December, 1842, which was enrolled on the 10th of June, 1843, but was not acknowledged by her until the 17th of September, 1845. Held, that it was effectual to bar the entail.

**M**ARTHA LOUISA MOORE and Louisa Anne, the wife of William Whittakers, being each entitled, as tenant in tail, to an undivided moiety of certain freehold premises in Gravel Lane, parish of St. Paul, Shadwell, executed an indenture, in New South Wales, where they then resided, dated 12th December, 1842, conveying the property to Philip Charles Moore, upon trust to sell. The indenture was transmitted to England, and was duly enrolled in the Court of Chancery on the 10th of June, 1843, pursuant to the Act for the Abolition of Fines and Recoveries (3 & 4 Will. 4, c. 74). On the 17th September, 1845, the indenture was produced and acknowledged by Mrs. Whittakers before a special commission in New South Wales, in pursuance of the above Act; and on the 21st of March, 1846, the certificate of acknowledgment, and an affidavit verifying it, and the signature thereto, were filed in the Court of Common Pleas at Westminster.

In August, 1848, the property was put up for sale by auction, and being purchased by the Petitioner, Stephen Taverner, was conveyed to him by indenture, dated 3 January, 1849.

The London Dock Company having purchased the property

property for the purposes of their Act, objected to the Petitioner's title to Mrs. *Whittakers'* moiety, on the ground that the acknowledgment was taken after the inrolment; and on the 1st of *February*, 1855, they paid 3,475*l.*, half the purchase-money, into Court. The Petitioner having, on the 1st *February*, 1855, presented a petition for payment of the 3,475*l.* and interest thereon at 5 per cent., together with the costs of the application, the question of title was argued.

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The 15th section of the 3 & 4 *Will.* 4, c. 74, empowers a tenant in tail to bar the entail; but, by the 40th section, every disposition of lands under this Act by a tenant in tail thereof must be effected by some one of the *assurances* (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute: "provided nevertheless, that no disposition by a tenant in tail shall be of any force, either at law or in equity, under this Act, unless made or evidenced by deed," &c. . . . "And if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same, and any deed which may be *executed* by her for effecting the disposition shall be acknowledged by her as hereinafter directed." The 41st section provides, that no "*assurance*," by which any disposition of lands shall be effected under the Act, shall have any operation under the Act, unless inrolled in Chancery within six calendar months after "execution" thereof.

The 77th section makes it lawful for every married woman, in every case except that of tenant in tail, "by deed to dispose of lands of any tenure and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender or extinguish any estate which she

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she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid," &c. "as fully and effectually as she could do if she were a feme sole, save and except that no such disposition, release, surrender or extinguishment shall be valid and effectual unless," &c. . . . "the deed be acknowledged by her as hereinafter directed."

The 79th section enacts, "that every deed to be executed by a married woman for any of the purposes of this Act, except such as may be executed by her in the character of protector, for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed, before a Judge of one of the superior Courts at *Westminster*, or a Master in Chancery, or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as hereinafter appointed." The 80th section directs, that before receiving the acknowledgment by any married woman of any "deed" under the Act, she shall be examined apart from her husband, to ascertain whether she freely and voluntarily consents to "such deed," and if she does not, she is not to be permitted to acknowledge the same; "and in such case, *such deed* shall, so far as relates to the execution thereof by such married woman, be void."

The 83rd section provides, that in case any married woman shall be prevented, by reason of residence beyond the seas, or for the reasons therein mentioned, from making the acknowledgment required by the Act before a Judge, &c., "it shall be lawful for the Court of Common Pleas at *Westminster*, or any Judge of that Court, to issue a commission specially appointing any persons therein named to be commissioners to take the acknowledgment

acknowledgment by any married woman, to be therein named, of any such deed as aforesaid: provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said Court or Judge shall think fit."

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The 84th section prescribes the form of memorandum to be indorsed on or written at the foot or margin of the deed by the person taking such acknowledgment of such deed.

The 86th section provides, "that when the certificate of the acknowledgment of a deed by a married woman shall be so filed of record, as aforesaid, the deed so acknowledged shall, so far as regards the disposition, release, surrender or extinguishment thereby made by any married woman whose acknowledgment shall be so certified, concerning any lands or money comprised in such deed, take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment."

*Mr. R. Palmer* and *Mr. W. H. Clarke*, for the Petitioner. The question is, whether the acknowledgment having been made after the enrolment is valid. By the express language of section 41, the enrolment must be made within six calendar months after the execution of the deed, and if not it is to be void; but the time is not fixed for making the acknowledgment, except that it is to be on or after the execution of the deed, s. 79. There is, therefore, a distinction between the enrolment and acknowledgment. The whole scheme of the act may be reduced to this:—there must be, first, execution of the deed; secondly, an enrolment within six calendar months after execution; and, thirdly, acknowledgment, but at what time is left undetermined; and the operation of the acknowledgment



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acknowledgment is kept in suspense until the certificate thereof is duly filed in the Common Pleas, and being so filed it is open to the inspection of all persons. It is clear also, from the other provisions of the Act, that the acknowledgment of the deed may be made at any time; for the power given to the Court of Common Pleas, or any Judge thereof, to issue a special commission and to fix the time of the return of the acknowledgment, as they or he should think fit, proves that it may be done at any time.

Mr. Lloyd and Mr. Goldsmid, *contrà*. The Company have no desire to obstruct the Petitioner, but they wish to have a good title, and a good title might easily be made, for Mrs. Whittakers could execute a fresh disentailing deed and acknowledge it before it is returned to this country for inrolment. It is assumed, that the "execution," mentioned in the 41st section, is the same as that in the 79th section; but the term is ambiguous, and means either the complete act of execution, or only sealing and delivery. The legislature did not mean the execution by a married woman to be valid as a mere sealing and delivery; but they intended, by "execution," the complete act, or the entire assurance: and to the 83rd section, which in certain cases empowers the Court to issue a commission to take the acknowledgment, returnable within a time to be fixed, it follows that, as soon as the acknowledgment is returned and the certificate filed, the assurance becomes complete, and it must be inrolled within six calendar months after. [The MASTER of the ROLLS: Your contention, in reference to the 83rd section, is, that if a deed is executed, and acknowledged twelve months after, and then inrolled within six months after the acknowledgment, that would do.] The execution means the whole assurance, including every thing,—the signing, sealing, delivery

delivery and acknowledgment; and if the deed is inrolled six months after the acknowledgment, that would be a compliance with the requirements of the Act. Indeed it would be absurd were it otherwise, and is obvious that that is so from the 41st section, which says, that no assurance of lands is to have any operation unless inrolled within six months "after the execution thereof." [*The MASTER of the ROLLS*: The 79th section makes a distinction between execution and acknowledgment.] It does so, but it is absurd, and it is questionable whether you can inrol the assurance until it has been acknowledged, for the execution is not complete until that has been done. There are several things to be done: the sealing, the delivery, the acknowledgment, filing the certificate, and the inrolment.

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Mr. *R. Palmer*, in reply.

*The MASTER of the ROLLS.*

June 21.

The question upon this petition is, whether the acknowledgment of a married woman must be taken before the inrolment under the statute of the 3 & 4 *Will.* 4, c. 74, usually intituled "The Fines and Recoveries Act."

This is a question which depends solely upon the construction of the clauses of the Act of Parliament, and, upon careful consideration of those clauses, which I am about to mention, I have come to the conclusion, that the acknowledgment of a married woman need not be taken before inrolment, but would be perfectly good and valid if taken after inrolment.

The first clause which, in any respect whatever, refers  
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to this subject, is the 40th section, which enacts, "that every disposition of lands under this act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition, if his estate were an estate at law, in fee simple absolute; provided nevertheless that no disposition by a tenant in tail shall be of any force, either at law or in equity, under this act, unless made or evidenced by deed." Now, I think, these words are material, and I shall shortly point out why I consider an important distinction is to be drawn in the construction of the act, as far as relates to the question, by the fact that it refers to the disposition by the tenant in tail, which is to be made or evidenced by deed. The distinction, the importance of which I shall refer to immediately, is very obvious upon the state of the law as it stood when this act passed. The disposition might be wholly effected, that is, the whole property might be conveyed by deed alone, such as by lease and release, but it might also be only evidenced by deed, such as a feoffment with livery of seisin, where the deed was evidence of the disposition, but did not, of itself, constitute the whole disposition. Now the same thing occurs in the case of a demise, where entry was necessary, for the purpose of making the assurance complete. This will be found to be material with respect to that which applies to the next section, where it is said, no assurance shall be valid unless inrolled. After proceeding in that way, the 40th sect. says:—"that no disposition by a tenant in tail, resting only in contract express or implied or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity, under this act, notwithstanding such disposition may be made or evidenced by deed; and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give

give effect to the same, and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed."

It therefore states nothing, except the necessity of an acknowledgment by her, which is to be specified in the subsequent part of the Act of Parliament.

Then comes the 41st section, which refers to this question also. This section gives directions as to the inrolment, and says, "that no assurance by which any disposition of land shall be effected, under this act, by a tenant in tail thereof, except a lease for any term, &c., shall have any operation under this act, unless it be inrolled in the High Court of Chancery within six calendar months after the execution thereof, and if the assurances by which any disposition of land shall be effected under this act shall be a bargain and sale, such assurance, although not inrolled within the time prescribed by the Act of Parliament of the 27 *Hen.* 8, shall, if inrolled in the Court of Chancery within the time, be as valid and effectual as if the same had been inrolled within the time prescribed by that act."

The principal argument, in fact, against the view that I have taken of this statute, is, that upon the effect of the word "assurance,"—that no assurance shall have any operation under this act, unless it be inrolled in the High Court of Chancery, that is, no assurance by which any disposition of land shall be effected under this act.

The word "assurance" does not, I think, mean that which constitutes a complete disposition of property, because the disposition of property by the previous clause, as I have pointed out, may be effected by deed

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or an assurance entire in itself, or may be effected partly by a deed and partly by something which the deed evidenced; such as in the case which I mentioned of a feoffment with livery of seisin; and that was the state of the law at the time this act which I have mentioned passed.

It cannot therefore be denied, that the deed might either be the whole assurance, or the evidence only of the assurance; and it is obvious that this, which was to effect a disposition, and which was to be evidence of the assurance, was to be inrolled, and in fact was the only thing which can be inrolled. In the cases that I have before mentioned, the whole assurance is not inrolled, but the deed only, which evidences the assurance.

It is to be observed, that the act specifies distinctly the time within which it must be done, namely, six months.

The next section which it is important to refer to, upon this subject, is the 77th, which is the general clause which enables alienation by a married woman. It specifies that a woman may dispose of her property, and contains this passage, "save and except that no such disposition, release, surrender or extinguishment shall be valid and effectual, unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her, as hereinafter directed."

Now there is here no reference whatever to the time of the execution, there is no reference to the time of the inrolment, but it only provides that her acknowledgment shall be necessary. The 79th section is the section which provides for the acknowledgment, which is to this effect:—"And be it further enacted, that every deed

deed to be executed by a married woman, for any of the purposes of this act (except such as may be executed by her in the character of protector for some party, for the sole purpose of her giving her consent to the disposition of the tenant in tail), shall, on her executing the same, or afterwards, be produced and acknowledged by her as her act and deed, before the Judge of one of the superior Courts at *Westminster* or the Master in Chancery, or before two of the perpetual Commissioners, or two special Commissioners to be respectively appointed as afterwards provided."

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It is to be observed, therefore, that the acknowledgment is not to be a part of the execution. It is distinctly specified here, that this is not to be part of the execution, because it is "upon her executing the same, or afterwards." It may be a distinct and separate act, and the clause does not specify within what time it is to be done. It shews this very clearly, because the 80th section, which provides for the mode of examination, has no reference whatever to the acknowledgment, except that it must be subsequent to the execution of the deed.

It specifies that she shall be examined "apart from her husband touching her acknowledgment of the deed," and so on, "and unless she shall freely and voluntarily consent to the deed [the Commissioners] shall not permit her to acknowledge the same," (the deed having been duly executed in such case,) that is to say, in case she does not acknowledge the deed, such deed, so far as relates to the execution thereof by such married woman, shall be void. So that, in fact, it provides that there should have been a previous execution, which execution is to be acknowledged; and if it is not acknowledged in a particular form there specified, it is to be void.

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The 83rd section, also shews this in the same manner more distinctly, because that provides that if, from being beyond the seas, or ill health, or any other sufficient cause, a married woman shall be prevented making the acknowledgment required by the act, then it shall be lawful for the Court of Common Pleas, or any Judge of that Court, to issue a commission for taking her acknowledgment. Now, that might require a very considerable time; and accordingly, as it is obvious that if a woman were to reside at *New Zealand*, or in the *Australian Colonies*, as a considerable length of time would be required, there is a proviso, that every such commission shall be made returnable within such time, therein expressed, as the Court or Judge shall think fit and reasonable. It is clear it does not limit this to six months. It is obvious that the Judge has power to extend the time beyond six months, and, in case he thinks fit and reasonable, more than six months may be given for the acknowledgment of a married woman; but, as I have already pointed out, the execution has already taken place, and to obtain an acknowledgment of her execution, an application is to be made to the Court after the execution has taken place, and the acknowledgment may be within such time as the Judge shall think fit and reasonable. The deed must be enrolled within six calendar months; but there is nothing in this clause to say, that, although the Judge shall think fit, he is not at liberty to give more than six months to acknowledge the execution; but that would be implied if it were absolutely necessary that the acknowledgment should be taken before enrolment.

The enrolment must take place within six months after the execution, that is expressly pointed out by the Act of Parliament. The 84th section confirms this, and specifies what the memorandum of acknowledgment shall

shall be; the 85th section specifies that the certificate of acknowledgment is to be filed with the affidavit. Then the certificate of acknowledgment must be duly filed, and duly verified by affidavit to be then filed of Record in the Court of Common Pleas. No time whatever is specified for this purpose in any part of the act, and the whole of the argument rests on the 41st section, with respect to the inrolment of assurances, which, I think, is limited to the extent pointed out in the observations I have already made. It is clear that the deed only affects a married woman from the time of the acknowledgment of the deed; the deed of course does not affect her until after her acknowledgment, but the same observation, to some extent, may be made with respect to other instruments, thus a lease is only a perfect lease after entry. The deed is a good deed, no doubt, but the disposition is not perfect until something else is done.

I am of opinion that the Court is not authorized to import into this act that which is not expressed, namely, that of two requisites to the validity of the disentailing deed, one of which is the inrolment, the other the acknowledgment by the married woman, the acknowledgment must precede the inrolment in point of time. It is not so specified in the act, and it would be to import into the act that which the words do not require.

I am more confirmed in this view of the case because the act is peculiarly specific and distinct in pointing out any question of time, wherever it occurs, directing what should be done with respect to priority of time, when it is considered an important and necessary element for making the dispositions of property effectual. As an instance of which, I refer to the 42nd section; there may be other instances in this Act of Parliament, but this is very distinct

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tinct in this respect. The clause relates to the mode in which the consent of a protector is to be given to the settlement, and it is enacted, "that the consent of a protector of a settlement to a disposition under this act of a tenant in tail shall be given either by the same assurance by which the disposition shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void." Therefore, in this case, where the consent of the protector was to be given, the legislature were of opinion that the consent of the protector should not be given subsequently to the execution of the deed, and, accordingly, here expressly points out that it must be done, either simultaneously or by a separate and distinct deed, to be either executed at the same time, or previously to the deed which effects the disposition of the property. I think that, if the legislature had intended a similar provision with respect to the acknowledgment of married women, it would have specified it in this Act of Parliament. It does not so specify it, and the clause to which I have referred appears to me to point out the possibility of its being made subsequently to that period, but having this check and guard upon it, that it determines it shall not be effectual, as far as a married woman is concerned, until after the deed has been acknowledged, and the certificate of that acknowledgment has been duly filed in the Court of Common Pleas.

I am of opinion, therefore, upon this act, the Petitioner is entitled to the prayer of the petition.

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NOTE.—Affirmed by the Lords Justices, November 9, 1855.

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## WARE v. CUMBERLEGE.

March 22.

April 18.

May 7.

July 17.

**T**HE testatrix, Mrs. *Hodges*, by her will dated in 1849, bequeathed the residue of her property, in equal shares, to twelve charitable institutions, which she specified.

The testatrix had no real estate, and the Chief Clerk found, that the value of her leaseholds and every other personal estate, which partook of the nature of real estate, was 5,093*l.* 0*s.* 3*d.*; and the amount of the pure personal estate was 39,707*l.* 14*s.* 11*d.* In this latter sum he included the value of shares in The St. *Katherine's* Dock Company, The *Grand Junction* Waterworks Company, The *Vauxhall* Waterworks Company, The *West Middlesex* Waterworks Company, The *Universal* Insurance Company, The *General Cemetery* Company and the *Southwark* Bridge Company. The next of kin of the testatrix insisted that these shares partook of the nature of real estate; that the gift of them to charity was void, under the Mortmain Act, 9 Geo. 2, c. 36, and that the Chief Clerk ought to have so found.

The Plaintiffs, who were some of the next of kin of the testatrix, applied to have the Chief Clerk's Certificate reversed or varied; and on the case coming on to be heard, it was agreed, as an appeal to the House of Lords was intended, to limit the argument to the shares of the *Grand Junction* Waterworks Company, in whose Act (51 Geo. 3, c. clxix) there was no provision that  
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Shares of an incorporated company, where the substance of the undertaking is a dealing with land, are within the Statute of Mortmain, unless specially exempted.

Bequest of shares in the *Grand Junction* Waterworks Company to a charity, held invalid.

Rule as to the appearance of the Attorney-General in charity cases.

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the shares should be considered personal and not real estate.

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Mr. *R. Palmer* and Mr. *G. L. Russell*, for the Plaintiffs, some of the next of kin, argued, that shares in a company, the profits of which were wholly derived from land, were clearly "an interest" in lands, and consequently within the very terms of the third section of the Mortmain Act. That the distinction that a shareholder could not take possession of the land and require his share therein was unsound, for if that were to prevail similar arrangements might be entered into as between partners or private individuals which would prevent any person taking possession or acquiring any share in the land itself. That if the aggregate of the shares was an interest in real estate, so were the components, and therefore within the Act, and if so, could not be taken out of its operation by the creation of a corporation or by being transmissible as personal estate to executors. Nothing less than a statutory enactment, that the shares, to all intents and purposes, should be personal estate, could destroy their character as "interests" in land. They argued, that the old authorities were express, and that no modern authority had gone the length of holding, that shares in an undertaking, the essence of which was the tenure of land, were not an interest in land. They cited *Sparling v. Parker* (a); *Myers v. Perigal* (b); *Tomlinson v. Tomlinson* (c); *Ashton v. Lord Langdale* (d); *Walker v. Milne* (e); *Negus v. Coulter* (f); *Knowlton v. Williams* (g); *Bligh v. Brent* (h); *Attorney-General v. Jones* (i); *Howse v. Chapman* (k).

Mr.

(a) 9 Beav. 450.

(b) 16 Sim. 533; 2 De G. Muc. &amp; G. 599.

(c) 9 Beav. 459.

(d) 4 De G. &amp; Sm. 402.

(e) 11 Beav. 507.

(f) Amb. 367.

(g) 4 Ves. 430.

(h) 2 Y. &amp; C. (Erech.) 268.

(i) 1 Mac. &amp; Gor. 574.

(k) 4 Ves. 542.

Mr. *Toller* and Mr. *Kenyon*, for the executors, referred to *Baxter v. Brown* (a).

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Mr. *Eddis*, for five of the charities. In modern cases a distinction is taken, that the particular interests of shareholders in the lands of a company do not give the shareholders a *direct interest* in the land, but that is not the question. The Mortmain Act makes use of no such expression, but says, "any estate or interest therein." He cited *Thornton v. Kempson* (b).

Mr. *Baggallay*, for another charity, cited *In re Langham's Trust* (c).

Mr. *Shapter*, Mr. *Greene* and Mr. *Cairns*, for other charities, referred to *Curling v. Flight* (d).


Mr. *Wickens*, for the Attorney-General, supported the gift. He argued, that the point had been expressly decided by the recent authorities already referred to, where the distinction was, whether there was a corporation or not. He cited *Edwards v. Hall*, in which he said that Vice-Chancellor *Wood*, on the 30th April, 1853, had held, that shares of the *Grand Junction Waterworks Company* were not within the Mortmain Act.

*The MASTER of the ROLLS.*

I shall consider the case a little more before I finally decide it. If it were not for the case of *Edwards v. Hall*, upon which, although I have not the grounds of the

(a) 7 *Manning & Gr.* 198.  
(b) *Kay*, 592.

(c) 10 *Hare*, 446.  
(d) 2 *Phill.* 613.

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the decision, I place great weight, I should have no hesitation as to the decision which I should come to upon this case. The distinction, if it can be supported, must be between a company incorporated by Act of Parliament, and a mere association of individuals; the former of which it is said so alters the property taken by a corporation as to make it not obnoxious to the Mortmain Act, although, in any other case, it remains obnoxious to the Mortmain Act. This is a distinction of so fine and delicate a description, that it is very likely to lead to serious difficulty and great litigation. I think one of the worst evils that can exist in expounding the law, is the creating and supporting distinctions of so shadowy a character, and that the best exposition of the law will be found to be by laying down broad principles, and disregarding narrow and minute distinctions. I doubt, also, whether the distinction can be supported in reason. It certainly is inconsistent with many of the cases to be found in the books. It does not appear to be in accordance with the view taken by Lord *St. Leonards* in the case of *Myers v. Perigal* (a), nor with the view taken by Lord Justice *Knight Bruce*, in the case of *Ashton v. Lord Langdale* (b); the distinction seems to be of the most singular description, because it is, that the members of a corporation do not hold the land in their individual character, but hold it amongst them in their corporate character; and, therefore, what they really possess for one and the same purpose, is altered by a name given them by the legislature, merely for the purpose of conveniently suing and being sued. The view which I have always taken of this subject is, that where the substance of the undertaking is a dealing with land, and that land is of the essence of the thing, which creates the junction of these parties together,

(a) 2 *De G. Mac. & Gor.* 599. (b) 4 *De G. & Sm.* 402.

together, whether incorporated or not, the case falls within the provisions of the Statute of Mortmain. In some instances, as in the case of a banking company, which has nothing whatever to do with land, except that they must have an office for carrying on their business, which is solely confined to dealing with money, a distinction is to be taken between them and those companies which deal entirely in land. I express no opinion upon the case of *Myers v. Perigal*, nor would it be fitting in me to do so. It does not appear to me to govern this case of the *Grand Junction Waterworks*. Lord *St. Leonards* seems to have thought that the case of *Walker v. Milne (a)*, which would govern it, had gone a good deal beyond that case, and Lord Justice *Knight Bruce* does not think he was bound by that decision.

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In the present state of the laws, I am disposed, in the great confusion of the authorities and of the cases, to decide it according to the view I take of these cases. With respect to these *Grand Junction Waterworks*, the Waterworks are so large and the shares so numerous, that it is probable that this case has occurred on many occasions, and I believe that the point has been abandoned by Counsel, but, although I have endeavoured to refer to some instance, I have not been able to do so. It only shews, as has been observed by all the Counsel, the extreme obscurity of the law upon the present point by reason of the decision, and affords another instance of the danger of attempting to do that which Lord *Eldon* was always desirous to avoid, viz., disturbing a long current of authorities: he expresses himself thus:—"if it had been *res integra*, I myself should have decided the other way, but it is infinitely better, for the sake of society, that a long series of decisions should

(a) 11 *Beav.* 507.

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should be confirmed, in order that persons may know what the law is and conform to it, than to disturb them by trying to get at something which, in the present state and view of the Courts, would have been the better decision in the first instance." I myself have undoubtedly seen many cases of very gross injustice, where testators have deprived their families of their property and have left them, without any reason, in abject poverty, by giving their property away to charity. Perhaps my opinion has been somewhat biassed by these cases, and I am not at all disposed to think, that it would be advantageous to the public to relax the rules respecting the Statute of Mortmain. According to the views I have formed, the shares in a canal company or shares in a waterworks company, where there is no clause in the Act of Parliament, providing that the shares should be personal estate, which appears to me to vary the case entirely, are obnoxious to the provisions of the statute, and ought to be so treated as such, and held to go to the next of kin or to the residuary legatees, and not to charity. I will, however, in consequence of what has been stated, with respect to the case of *Edwards v. Hall*, and from the respect I have for the opinion of Vice-Chancellor *Wood*, look into the authorities before I finally dispose of this case; but I have thought it proper to state the view which I at present take of the case.

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*The MASTER of the ROLLS.*

*May 7.*

I have looked at all the authorities on the subject, and I see no reason to add to or retract anything from what I said on the former occasion. I am of opinion, that, upon the decisions as they are stated, these shares  
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are obnoxious to the provisions of the Mortmain Act, and that accordingly they do not pass under the devise. It is certainly not easy to reconcile all the decisions on the subject, and I am very glad that this case is about to be carried further, in order that some final decision may be come to on the subject. I have looked carefully through these cases, and although there certainly has been a change to some, though not very material, extent of late years, I still think, that upon the decided cases which appear in the books, the opinions which I stated on the last occasion are supported. I must repeat the view which I then stated, that, according to my experience, it is for the general good of society that the provisions of this act should not be cut down so as to enable persons to dispose of property to charities after their death, to the disherison of their near relations, though undoubtedly the promotion of charity, during their lifetime, is a very desirable object, and one which ought to be encouraged (a).

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As to the costs and the testamentary expenses, they are to come out of the shares rateably, and then an apportionment will be made of the costs between the general personal estate and that part which passed to the next of kin.

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The Attorney-General had been made a Defendant in the first instance, it being doubtful what charities were intended by the testator; but after the Chief Clerk had certified what the charities were, and the case had come on upon motion to vary his certificate, it was allowed to stand over to serve them. The charities accordingly appeared, and the question now was, whether the

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(a) See *Edwards v. Hall*, Lord Chancellor, December 3, 1845.



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the Attorney-General was to be kept before the Court, and how his costs were to be provided for.

Mr. *Wickens* for the Attorney-General. It is entirely a matter of indifference to the Attorney-General except as a matter of principle. No doubt all the charities in this case are represented. I have never been able to discover that there is any rule as to the Attorney-General in such a case; the Court sometimes, even when the charities are individually represented, desires that the Attorney-General should be present; but, no doubt, it sometimes acts in the presence of the individual charities without requiring the Attorney-General to be here. In a case before Vice-Chancellor *Wood* of *Dunn v. Bowness*, on the 2nd of July, 1855, the question was discussed, and his Honor there thought (but no doubt under the special circumstances of the case with regard to what remained to be done in the suit, which was simply the apportionment of the property between pure and impure personalty) that it would be better that the Attorney-General should also represent the charity, and thereupon, in that case, he kept the Attorney-General before the Court. The questions which arise in the case regulate the discretion of the Court in considering the matter, but there has been an anxiety for some time to have a general rule on the subject, and if the Court could lay down one which would guide the profession, it would be very acceptable. The question is very often asked, and is one of considerable difficulty to the Attorney-General. It is entirely indifferent to him how it is settled.

*The MASTER of the ROLLS.*

It is difficult to lay down any general rule, which shall be adapted to every case; there must be a great deal

*deal* of discretion in these matters. The general principle which regulates them I take to be something of *this description* :—the Attorney-General represents all **absent** charities, and it is sufficient to have him here to **represent** all absent charities. But absent charities may **obviously** be of two different characters : they may **either** be under gifts to specified individual charities, or to charity generally. In case the gift is for charity generally, no one can represent it but the Attorney-General, and he must be here to represent such general charities. When there are specified individual charities, then the Attorney-General's presence is not universally necessary ; but it is required by the Court upon various occasions, as, for instance, where any rules are required for the regulation of the internal conduct of the charity itself, such as the establishment of a scheme and the like ; there the Attorney-General is necessary for the purpose of aiding and assisting the Court in directing and sanctioning the general system and principle that ought to govern charities of those descriptions. But there are other cases where there is no question as to the conduct or management of the charities, but only whether the charity is entitled to a particular legacy or not. In those cases, the Attorney-General is rather in the nature of a trustee for those charities, and the Court prefers having before it the charities beneficially interested, for the purpose of putting their interests before the Court in the light which they consider most favourable to them. In those cases I think it preferable that the charity itself should appear, rather than that the Attorney-General should represent it. This appears to me to be one of that latter class of cases, and therefore it would be better that the charity should appear. Having stated that as my general view of the case, it is very obvious, as Counsel will see, that

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1855. there may be mixed cases in which it is impossible to lay down a rule beforehand, and in which the Court must act on the matter before it in such manner as, according to the best exercise of its discretion and judgment, it may think best calculated to promote justice.

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RUMP v. GREENHILL.

Nov. 15, 16,  
21.

Practice of the Court in granting or refusing the common administration decree, upon summons, in cases involving complicated questions.

A testator gave his estate to the Plaintiffs (his executors) in trust for his son for life, remainder to his daughter in law for life, remainder to their children.

The son effected a compromise with an annuitant under the will, by means of part of the testator's assets advanced by the Plaintiffs. He died leaving his widow his executrix and universal legatee. A decree was made to administer the first testator's estate, wherein the executors were disallowed both the money advanced for the compromise and the annuity which was the subject of it. They filed a second bill against the widow and children to have the rights of the parties under the compromise settled, and to determine other questions arising between them and the son. A demurrer for multifariousness and want of equity was overruled.

When there is a demurrer for multifariousness on the record, the Defendant may demur *ore tenus* for want of equity.

THE testator, *William Smith*, devised a cottage to *Harriott Wiggett*, and his real estate to the Plaintiffs (*Rump and Pilgrim*, whom he appointed his executors), upon trust to pay *Harriott Wiggett* an annuity of 15*l.* for life, and subject thereto, upon trust for his son *Robert B. Smith* for life, remainder upon trust for *Sarah Ann*, his son's wife, for life, remainder upon trust for their children; and he gave his residuary personal estate upon certain trusts for the benefit of his son and daughter and their issue.

By a third codicil, dated the 26th *March*, 1847, the testator gave *Harriott Wiggett* some household furniture,

niture, and increased her annuity to 50*l.* per annum for life.

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The testator died on the 28th of *March*, 1847. *Robert B. Smith* contested the validity of the third codicil, but a compromise was entered into with *Harriott Wiggett*, who agreed to give up her claims for the sum of 500*l.* This sum the Plaintiffs, the executors, at the request of *Robert B. Smith*, advanced out of the testator's estate, and paid it to *Harriott Wiggett*, who, in consideration of the sum of 500*l.*, therein expressed to be paid to her by *Robert B. Smith*, assigned the annuities and furniture to *Robert B. Smith*. The deed of assignment was, with the acquiescence of *Robert B. Smith*, retained by the executors, by way of deposit as a security for their advances, and *Robert B. Smith* also gave them his promissory note for 500*l.* and interest.

The will and codicils of the testator were then proved by the Plaintiffs in *October*, 1847.

*Robert B. Smith* died in *October*, 1852, having appointed his wife his executrix and sole legatee. She proved the will, and afterwards married *Greenhill*.

In 1853, a suit of *Smith v. Rump*, for the administration of *William Smith's* estate, was commenced by summons by the children of *Robert B. Smith* originally against the executors, and notice of the proceedings therein was afterwards served upon Mr. and Mrs. *Greenhill*. The ordinary administration decree was made, and the usual accounts were directed to be taken. On the 19th of *July*, 1854, the Chief Clerk made his certificate, disallowing the Plaintiffs the sum of 500*l.* advanced by them in respect of the compromise with *Harriott Wiggett*, and also certain other sums con-

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nected therewith, and refusing them credit in respect of the annuity bequeathed to *Harriott Wiggett* by the third codicil.

On the 21st of *October*, 1854, the Plaintiffs, the executors of the first testator, filed this bill, alleging that doubts existed whether the purchase from *Harriott Wiggett* was effected for the benefit of the parties interested in the residuary estate of *William Smith*, or for the individual benefit of *Robert B. Smith*.

The bill then stated, that the Plaintiffs, the executors, had, from time to time, made advances to *Robert B. Smith* on loan, out of the testator's estate, and that he had given them a mortgage of certain real estate and a policy of assurance for 500*l.*, by way of security for such advances. The bill further stated, that *Robert B. Smith* became indebted to the Plaintiffs, as the executors of *William Smith*, for certain household furniture sold to him, and for the costs of effecting the compromise with *Harriott Wiggett*, &c., upon the supposition of the same not being chargeable against the estate of the testator. That since the decease of *Robert B. Smith*, in *October*, 1852, his estate (upon the like supposition) had become further chargeable to the Plaintiffs in three several sums of legacy duty paid by the Plaintiffs on the bequest of the furniture to *Harriott Wiggett*, on the income of the proceeds of the sale of the real estate payable to *Robert B. Smith* for life, and on the specific bequest to *Robert B. Smith*. That, in treating *Robert B. Smith* as purchaser of the furniture bequeathed to *Harriott Wiggett* by the third codicil, he became entitled to credit in account for the amount thereof, and, treating the purchase of the annuities as effected personally on behalf of *Robert B. Smith*, he was entitled to have credit, in account, in respect thereof,

thereof, subject to the rights of the Plaintiffs to the appropriation of the same in account with him, in respect of the transactions aforesaid. That no payment was ever made to *Robert B. Smith* in respect of the said annuities or the income of the testator's estate, and the accounts in respect of the testator's estate were unadjusted at his decease; that on his death, the Plaintiffs obtained payment of the policy of insurance, and that the mortgage was a very inadequate security for the amount still remaining due; that *Robert B. Smith* appointed his wife executrix of his will, and that she and her present husband had possessed themselves of his personal estate and entered into receipt of the rents and profits of the real estate. That, as the Plaintiffs were advised, a question existed, how far the said compromise was to be treated as a purchase on behalf of *Robert B. Smith*, or as an extinguishment of the rights of *Harriott Wiggett* to the annuities and furniture, either for the benefit of the parties generally interested in the testator's residuary estate, or his own children in particular, and that the settlement of that question, which was not raised in the suit of *Smith v. Rump*, was requisite to the due administration of the estate. That provision could not be made in that suit, from the nature and frame of it, for the settlement of the accounts between the Plaintiffs and *Robert B. Smith's* estate, and the adjustment of the question as to *Harriott Wiggett's* compromise, and that what was coming to the estate of *Robert B. Smith*, upon the taking of the account in that suit upon the principle upon which they were to be taken, would be insufficient to pay the Plaintiffs' demand against his estate.

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The bill prayed, that, if and so far as might be proper and necessary, this suit might be taken as supplemental to the suit of *Smith v. Rump*, and come on to be heard with

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with it on further consideration. That the Plaintiffs might be allowed in account against the estate of *William Smith* and the parties interested therein, the 500*l.* and the other payments connected therewith, or if not, that they might have the benefit thereof in account with the estate of *Robert B. Smith*, and that the annuities and value of the furniture bequeathed to *Harriott Wiggett* might be considered as subsisting, and as chargeable, in favour of the Plaintiffs, with what might be payable to them on account of their payments in respect of the compromise, &c. That if the Plaintiffs might be disallowed, in account against the estate of *William Smith*, the payment relating to the compromise, and if it either should not be necessary to resort to the annuities of furniture in payment of the Plaintiffs, or if any surplus should be left after such payment, then that it might be ascertained and declared, whether the same formed part of the estate of *Robert B. Smith*, or whether the children of *Robert B. Smith* were entitled to have the purchase treated as effected for their benefit, and their share of the estate of *William Smith* exonerated from the same. That an account might be taken of what was due to the Plaintiffs from the estate of *Robert B. Smith*, and that they might be entitled to set off against such demand what might be coming to *Robert B. Smith's* estate on taking the accounts in *Smith v. Rump*, and that any deficiency might be raised and paid out of the general estate of *R. B. Smith*, and that so far as necessary, this suit might be treated as a creditors' suit against his estate, and that the usual account might be taken; and for a receiver and injunction against Mr. and Mrs. *Greenhill*.

To this bill Mr. and Mrs. *Greenhill* and the children of *Robert B. Smith* put in separate demurrers on the ground of multifariousness.

Mr. — —.

Mr. *G. L. Russell*, in support of the demurrer of Mr. and Mrs. *Greenhill*. The bill seeks the administration of the estate of both *William Smith* and *Robert B. Smith*, and prays for alternative relief out of the one or out of the other ; but the children of *Robert B. Smith* ought not to be involved in questions of account with his estate, which all belongs to his widow, and in which they have no concern ; they have arisen solely out of the transactions in reference to the compromise. This compromise, being a breach of trust, the Plaintiffs can have no claim against the estate of *William Smith* for the appropriation of any part of it in payment of the sums applied by them towards effecting it, as to which transaction they have, throughout the bill, mixed up their claims as executors of *William Smith* with those in their individual character. The bill is, therefore, clearly multifarious ; *Ward v. Duke of Northumberland* (a) ; *Marcos v. Pebrer* (b), doubting the principle of *Turner v. Robinson* (c) ; *Turner v. Doubleday* (d). The bill is also demurrable, because it only prays relief against the estate of *Robert B. Smith*, contingent upon the Plaintiffs' being disallowed their claims in account with the estate of *William Smith* ; *Seddon v. Connell* (e). The bill is also demurrable for want of equity ; for though a demurrer for want of equity has not been filed, the Defendant may demur *ore tenus* on that ground, as it applies to the whole bill, in the same way as the demurrer on record. This was established in *Crouch v. Hickin* (f), in which case, there was a plea to part of the bill and a demurrer to the rest, and, the latter being overruled, a demurrer *ore tenus* for want of equity was allowed. A Defendant may demur *ore tenus* for want

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of

(a) 2 *Anstr.* 469.

(b) 3 *Sim.* 466.

(c) 1 *Sim. & Stu.* 313.

(d) 6 *Madd.* 94.

(e) 10 *Sim.* 79.

(f) 1 *Keen*, 385.

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of equity; *Durdant v. Redman* (a); *Beames's Orders* (b); 1 *Dan. Pr.* (c); 2 *Id.* (d); *Mitford, Pl.* (e). The Plaintiffs have clearly no equity to support their bill, for, in the suit of *Smith v. Rump*, they might have obtained all the relief they are entitled to. The bill is therefore demurrable for want of equity.

Mr. *G. Lovell*, in support of the demurrer by the infant children of *R. B. Smith*, relied on *Marcos v. Pebrer* (f); *Trench v. Harrison* (g).

Mr. *Roupell* and Mr. *Goodeve*, in support of the bill. The Plaintiffs could not have obtained full relief in the other suit. That is shewn from the course which has been taken in it, for their claims have been rejected, and a separate, or additional suit, has therefore become necessary to establish their rights. When there is on the record simply a demurrer for multifariousness, there cannot be a demurrer *ore tenus*, for want of equity; for that is wholly inconsistent with the record, which admits two valid grounds of equity, but asserts that they ought not to be united in one suit. If you demur for the minor, you cannot then demur *ore tenus* for the major ground of demurrer, which you have passed over on your pleading; *Pitts v. Short* (h). The demurrer for multifariousness cannot be supported, for, in certain circumstances, different estates may be united in the same suit, when they are so mixed together as to make it convenient or necessary; *Campbell v. Mackay* (i); *Attorney-General v. Cradock* (k). Lastly, it is plain that the question of the compromise could not

(a) 1 *Vern.* 78.

(b) Page 174, n. 39.

(c) Page 446.

(d) Page 92.

(e) Page 217 (4th edit.)

(f) 3 *Sim.* 466.

(g) 17 *Sim.* 111.

(h) 17 *Ves.* 213.

(i) 7 *Sim.* 564; 1 *Myl. & Cr.* 608.

(k) 3 *Myl. & Cr.* 85.

Not have been disposed of under the decree in the suit of *Smith v. Rump*, which did not reach such a case.

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Mr. *G. L. Russell*, in reply. If a demurrer be to the whole bill, you may *ore tenus* shew any cause of demurrer which applies to the whole bill; but if the demurrer be to part only, then the demurrer *ore tenus* must be confined to that part; *Cartwright v. Green* (a). Here the demurrer is to the whole bill, and therefore it may be demurred to for want of equity; *Broderip v. Phillips* (b); *Mitford, Pl.* (c); 2 *Dan. Prac.* (d).

Mr. *Roupell* then moved to stay proceedings in *Smith v. Rump*, and consolidate it with the present cause of *Rump v. Greenhill*. He argued that justice could not be done to the parties, unless the two suits came on together.

The dates of the proceedings were as follows:—The administration summons issued in *November*, 1853; the Chief Clerk's certificate was made in *July*, 1854; the present suit was instituted in *October*, 1854; notice of this motion given on the 5th of *November*, and the demurrers were filed on the 8th.

Mr. *G. L. Russell*, and Mr. *G. Lovell*, *contra*.

*The MASTER of the ROLLS.*

I will dispose of the demurrer on *Monday*. My present impression is, that the objection for multifariousness cannot be sustained; and that there are sufficient allegations in the bill to sustain it in other respects.

But

(a) 8 *Ves.* 405.  
(b) 1 *Vern.* 78, n.

(c) Pages 217, 246.  
(d) Page 542.

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But whatever I do about the demurrer, I am of opinion that this motion ought to be refused with costs. This is a case in which a summons was issued on the 23rd of *November* in last year (now within a very few days of one year since). The form of proceeding on which a summons for the administration of the estate is issued is this:—The Plaintiff calls on the executors to shew cause why the common administration decree should not be made. It would be a sufficient cause to state that there are complicated questions, involving the rights of various parties, arising from the dealings and transactions which the executors had, during the lifetime of the tenant for life of the property, and affecting also the purchase of an annuity from an annuitant under the will, in order to get rid of it, and to avoid the question on the will. When there is a question which cannot be properly dealt with under an administration summons, the Court does not grant the common administration decree, but says, “if you will file a bill to bring these questions before the Court within a limited period, as within a fortnight or three weeks, no administration decree will be granted;” but if that be not done, the Court then makes the usual order for administration, and considers that the Defendants have waived the question.

These parties had full notice of the whole of the questions now raised; they did not bring them before the Court or Chief Clerk, but allowed the order to be made, as if the case were proper for the usual order for administration. The certificate of the Chief Clerk was made in *July*, 1854, and the cause must have been within a few days of being heard before the long vacation, and then, on the 21st of *October*, 1854, a bill is filed for the purpose of raising all these questions for the first time, and a motion is now made to stay, in effect,

effect, the proceedings in the other cause, until this cause can be heard ; offering, no doubt, to have these questions disposed of in any manner that the Court shall think fit, but without a word of explanation why a period of at least eleven months has been passed without any step being taken for that purpose.

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I am quite sure the Court would act very unwisely, and only encourage useless litigation, and unnecessary delay, if it allowed the cause to be postponed upon this application. Under these circumstances the motion must be refused.

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*The MASTER of the ROLLS.*

Nov. 21.

This is a case of a demurrer put in to the bill for multifariousness and a further demurrer, *ore tenus* for want of equity. On the fullest consideration, the opinion which I formed at the hearing is confirmed, and I think that neither of these demurrers can be sustained.

The first way to look at the case is this:—Suppose there had been no suit for the administration of the assets of *William Smith*, and that this suit had omitted the supplementary statements, and prayed simply an account of the estate of *William Smith*. In that case I entertain no doubt that it could be maintained as a suit for the administration of the estate of *William Smith*. It is true the bill prays various things, to which it appears to me, as at present advised, the Plaintiffs are not entitled ; but the question is, whether the Plaintiffs are entitled to any relief at all.

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It has been argued that the children of *Robert B. Smith* are not to be involved in the account of *Robert B. Smith's* estate, in which they have no concern, and that the questions have arisen solely in consequence of the dealing which took place between the executors of *William Smith* and *Robert B. Smith*, with reference to the claims and interests of *Harriott Wiggett* upon the estate of *William Smith*. I am of opinion, that if this suit had been instituted against the representatives of *Robert B. Smith* to settle differences arising out of or relating to the estate of *William Smith*, it could not be maintained without making the other parties interested in the estate of *William Smith* parties. It is essential, in such a suit, to ascertain the shares of the children and the other parties interested in *William Smith's* estate, arising out of these transactions. It undoubtedly may become necessary to go into various matters in which the children have no interest, but that alone does not make a bill multifarious. It frequently happens that one of several residuary legatees has mortgaged his share before the suit is instituted, the mortgagee is, in consequence, made a party, and questions of difficulty may and do constantly arise between the mortgagor and his mortgagee, in which the other residuary legatees have no concern; still the mortgagee is a necessary party to the suit, and the rights of the legatees cannot be ascertained without making him a party. The way in which the Court deals with such cases is, by making the costs fall on the mortgaged share, and the Court takes care that one residuary legatee does not pay the costs of ascertaining the rights between another and his mortgagee with which he has no concern. The same thing may arise in the present case. With regard to the purchase of the annuity and the compromise of the rights of *Harriott Wiggett*, it is possible that the children of *Robert B. Smith* may contend, that  
this

this transaction was entered into for their benefit or for the benefit of their father; they may insist on either of these points, and the rights and interests of the parties cannot be ascertained except by a suit. There are other questions respecting the furniture and the payment of legacy duty, which must be determined in the administration of *William Smith's* estate, and in these questions these children, so far as relates to such questions, are necessary parties. They may possibly have no interest in some of the matters, as in the accounts of *Robert B. Smith's* estate, but, because a Plaintiff prays for more than he is entitled to, it does not prevent his having so much of the relief as he may be entitled to, unless the matters be so unconnected that they cannot be proved in the same suit.

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That is the view I should take of this case if these were original suits for the administration of *William Smith's* estate. But it was argued, that if, in fact, this is a suit for that purpose, and, so far, proper and fit for that purpose, its object may be effected in the administration suit which originated in a summons, and which is now pending in this Court; that if the Chief Clerk has not certified these matters as he ought, the Plaintiffs may, by objecting to the certificate, bring these matters before the Court, and that it would be injurious to the new practice, if the Court were not to determine these questions under the administration decree.

I have considerable doubts whether the supplemental relief could have been successfully obtained in respect of these transactions, which involve questions between *William Smith's* estate and the legal personal representative of *Robert B. Smith*. They are intimately connected, and the estate of *William Smith* cannot be administered without the disposal of these questions,  
 which

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which a common decree will not reach. If this bill had been confined solely to the questions which could not be determined in the other suit, the Plaintiffs would be entitled to relief, and some account and inquiry would be necessary for that purpose. I think the Plaintiffs have established a right to some inquiry and decree in respect of these matters.

I am of opinion that the demurrer for multifariousness and want of equity cannot be sustained.

I at first doubted whether the demurrer *ore tenus* for want of equity could be raised when the only demurrer on record was for multifariousness, but the latest authorities seem to establish that it could.

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COBBETT v. BROCK.

May 5.

When a man obtains, without consideration, a security from a lady to whom he is engaged to be married, the Court requires him to shew the *bona fides* of the transaction.

AT the end of 1849, Mr. *Brock*, a tailor, was considerably indebted to the Plaintiffs, his drapers, and they, being unable to obtain payment, employed an accountant to ascertain the state of his affairs, and contemplated taking proceedings to compel payment of their debts. Mr. *Brock*, to obtain time, promised the Plaintiffs

A debtor induced a lady, to whom he was engaged, to become security for a debt. After the marriage, she insisted that she had been imposed upon. Held, that the only duty of the creditor (who was aware of the relation between the parties) towards the lady was, to see that she had proper professional assistance, and that any fraud or misrepresentation of the debtor in the transaction, of which the creditor had no notice, did not affect his security.

Plaintiffs to give them security for their debt, and the security he proposed was that of Miss *Sophia Ann Colyer*, a lady with whom he stated he was about to be married.

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The Plaintiffs' solicitor, Mr. *Pike*, accordingly prepared the draft of a security, whereby Miss *Colyer* mortgaged her reversion in some real estate for securing the debt. On the 21st of *January*, 1850, Mr. *Pike* sent the draft to Mr. *Brock*, with a letter, which was as follows:—"I send draft of the proposed security in favour of Messrs. *Cobbett* and Mr. *Gabriel* [the Plaintiffs], for your perusal, and when you have satisfied yourself of its accuracy, be so obliging as to send it to Miss *Colyer*, with my particular request, that she will get some respectable solicitor to peruse it on her behalf and advise with her on its effect and provisions."

The draft was returned approved by Mr. *Basham*, a solicitor on behalf of Mr. *Brock* only. Mr. *Pike* immediately returned it to Mr. *Brock*, with the following letter:—"The letter which I sent you particularly requested that Miss *Colyer* would have the draft perused by a solicitor, on her behalf. If Mr. *Basham* did this, pray get him, as soon as possible, to put a certificate of that fact on the enclosed, but if he does not consider himself as representing her, then I should still wish her to be advised by some other solicitor, who will give such a certificate."

On the following day, it was returned to Mr. *Pike* with the approval of Mr. *Basham* amended, and stating that he had perused the draft, and approved thereof on the part of Mr. *Brock* and Miss *Colyer*. The deed was engrossed, and Mr. *Brock* attended with Miss *Colyer*, by appointment, at the office of Mr. *Basham*,  
and



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and executed the security, and the matter was afterwards completed by handing it over to the Plaintiffs.

There were subsequent acts of confirmation of this deed by Mr. *Brock* and Miss *Colyer*, but these did not form the grounds of the decision of the Court. The marriage between them took place in *October*, 1850, and the estate having fallen into possession and the money remaining unpaid, this suit was instituted, in 1854, for a foreclosure.

The relief sought by the Plaintiffs was resisted both by Mr. and Mrs. *Brock*, who insisted, that the deed was not binding and could not be enforced in this Court. Mrs. *Brock*, in resistance to the claim of the Plaintiffs to be paid out of her estate, insisted on the formularies usual in such cases. She said that the deed had been obtained through undue influence on the part of her husband, and by fraud, deception, misrepresentation, surprise, concealment and suppression of facts on the part of the Plaintiffs and their solicitor. She said that it had been represented to her by them, that the difficulties of Mr. *Brock* were merely temporary, that the Plaintiffs had promised to afford him assistance and forego all interest, and that she should never be called on to pay the debt, which would be paid out of the profits of Mr. *Brock's* business, whereas he was, at the time, in a hopeless state of insolvency. In addition to this, she said, that she did not employ her own solicitor, but trusted entirely to Mr. *Pike*, who was a friend of her husband; that the deed had not been read over or explained to her and had never been perused on her behalf, and that she had executed it without proper professional advice. She stated that she had been taken by Mr. *Brock* to the office of some solicitor, where she executed the deed.

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The whole of these allegations, as regarded the Plaintiffs, were positively denied, and were unsupported by any proof, with the exception of the influence which Mr. Brock, under the circumstances of his approaching marriage, naturally possessed over Miss Colyer, and except the fraud or misrepresentation (if any) on his part. With respect to the professional assistance afforded Miss Colyer on the occasion of this transaction, it appeared, from the evidence of Mr. Basham, that Miss Colyer was a stranger to him, that he received instructions from Mr. Brock to peruse the deed on his behalf, and that he had done so, and that by his appointment Mr. Brock brought a lady, whom he supposed to be Miss Colyer, to his office, when they both executed the deed. He denied (inadvertently) that he had ever been professionally employed by Miss Colyer, and he stated that he had never seen her since.

Mr. R. Palmer and Mr. Bright, for the Plaintiffs, argued that the security was perfectly valid, and that the deed must be acted on until it had been set aside by an independent suit; *Jacobs v. Richards(a)*.

Mr. Lloyd and Mr. W. H. Clarke, for Mrs. Brock. The security was voluntary and obtained by undue influence and misrepresentation; the parties taking the benefit of it are bound to prove the *bona fides* of the transaction, and that the lady voluntarily and deliberately did the act, knowing its nature and effect; *Cooke v. Lamotte(b)*; *Hoghton v. Hoghton(c)*. The Plaintiffs knew of the engagement between Mr. Brock and Miss Colyer, and are bound to prove these circumstances, and they have failed in doing so. Besides, they employed Mr. Brock to obtain the security from

(a) 18 Beav. 300.

(b) 15 Beav. 234.

(c) 15 Beav. 278.

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from her, and they are bound by every representation made by him. She considered that the execution of the deed was a matter of form, and that it would release her intended husband from all his difficulties, and in that belief she mortgaged her estate, without consideration, as a security, to the Plaintiffs, for an utterly hopeless debt due from Mr. Brock. Such a security cannot, in equity, be enforced.

Mr. Whiteley, for Mr. Brock.


Mr. E. G. White and Mr. Bury, for other parties.

## The MASTER of the ROLLS.

In cases where a deed is obtained by fraud or undue influence, though it may be avoided as between the parties, yet it cannot be set aside as against a person claiming for valuable consideration under it, and without notice of the fraud. The real question is this:—assume that a fraud was committed by the husband, did the Plaintiffs know of that fraud?

The state of the case is this:—Mr. Brock was indebted to the Plaintiffs in considerable sums of money, and he seems to have had some apprehension that he should be made a bankrupt if the debt was not paid. He thereupon says to the Plaintiffs, I am about to be allied to a lady, and she will give you security for your debt. The solicitor of the Plaintiffs is put in communication with Mr. Brock, who goes to the lady and makes some representations. I will assume them to have been false, and that he stated that his difficulties were temporary, and that this security would afford him the means of getting over his embarrassments. Assume this, there is not a tittle of evidence that the

to his misrepresentations. All they did was to say, "We will forbear to sue you or to make you a bankrupt provided you give us the security of some other party." For the purpose of preparing the security they employed a solicitor; but he did not act as solicitor for this lady, though he was a friend of Mr. *Brock*, he repudiates that character altogether, and in his letter of the 21st of *January*, 1850, he insists that she should have a solicitor of her own. He did not trust to Mr. *Brock* to explain the matter to Miss *Colyer*; for when the draft was returned to him, sanctioned and approved by a solicitor on behalf of Mr. *Brock* only, he says, "This will not do, it must be sanctioned and approved of by the solicitor of Miss *Colyer*," and it was afterwards done.

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What was the duty of Mr. *Pike* to this lady? It was the duty of her own solicitor, and not of the solicitor of the Plaintiffs, to protect her. Mr. *Pike* did not affect to be her solicitor; all he required was, that she should have a solicitor of her own; it was the duty of her solicitor to ascertain that she knew what she was about to do, and the Plaintiffs' solicitor was bound to trust to the note of her solicitor that the deed had been approved by him on her behalf.

If I were to hold, that by reason of any misrepresentations of Mr. *Brock* the transaction could not stand, the result would be, that no debtor could obtain the forbearance of his creditor by getting a friend to give a security for him, unless the solicitor of the creditor took upon himself the duties of the solicitor of the surety.

There was ample consideration for the deed as between the Plaintiffs and Mr. *Brock*, by their forbearance to sue; and a solicitor being employed by Miss *Colyer*, it

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was his duty to see that she understood the matter, and if he performed his duty the transaction was perfectly good and valid. I conceive that all that the Plaintiffs' solicitor had to do was, to see that she had independent professional advice, and this he did.

I look at the case in the same light as if certain benefits had been voluntarily conveyed to Mr. *Brock* by Miss *Colyer*, and he had afterwards sold them to the Plaintiffs. The fact of this being one transaction does not affect the question, unless the Plaintiffs were privy to a fraud.

Hitherto I have assumed that a fraud was committed on Miss *Colyer*, that there was undue influence, and that it would be very difficult for Mr. *Brock* himself to take advantage of the transaction: still she knew that she was executing securities which bound her property; that is the reasonable inference from the evidence. *Basham* must have considered himself as her solicitor, for that was pointedly put to him when it was stated that he must approve of the draft on behalf of the lady; he did so, and I assume he performed his duty.

What else was it possible for Mr. *Pike* to do? It was not his duty to go to Miss *Colyer*, and try to persuade her not to execute the security, and I am of opinion, that he had no duty towards this lady except to see that she had proper professional assistance.

I fully adhere to what I expressed in the cases of *Cooke v. Lamotte* (a), and *Hoghton v. Hoghton* (b), and if this were a case between Mr. *Brock* and his wife I should require him to prove all the requisites I pointed out

(a) 15 *Beav.* 234.

(b) 15 *Beav.* 278.

out in those cases as necessary to give validity to the transaction; but when the security gets into the hands of a purchaser for valuable consideration, the case is very different, unless the person obtaining the benefit of it has been guilty of or privy to the fraud. The fact of Mr. *Brock* saying, "I am about to marry a lady who will give you security," does not amount to notice to them that this security could only be obtained by undue influence.

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**COBBETT**  
 v.  
**BROCK.**

The subsequent transaction stands or falls with the original, and the result is that the Plaintiffs are entitled to the decree asked.

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NOTE.—Dec. 5, 1855. An appeal was dismissed with costs by the Lords Justices.

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CHILTON v. CAMPBELL.

**SIR ROBERT CAMPBELL** was seised in fee of some freehold estates, the title deeds of which were in the hands of his eldest son, Sir *John Campbell*. In 1850, Sir *John Campbell* deposited these deeds with the Plaintiffs to secure some monies then lent to him, and he, at the same time, stated, that his father had left him the estates by his will, and had authorized him to raise money by a deposit of the deeds. In 1855, Sir *Robert*, discovering that the deeds were in the hands of the Plaintiffs, demanded them, and afterwards commenced an action at law to recover them. The Plaintiffs thereupon, on the 4th of *May*, instituted the present suit

*May 8.*  
 The Plaintiff, before filing interrogatories, moved for an injunction to stay proceedings at law. The Defendant filed an affidavit displacing the grounds of defence at law. The injunction was refused.

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suit against Sir *Robert* and Sir *John*, insisting on their equitable mortgage and seeking to have the benefit of it, and for an injunction to restrain the proceedings at law.

The bill alleged, that Sir *Robert* expressly authorized his son to deposit the title deeds, as a security for the actual advances made to him by the Plaintiffs, or at all events, that Sir *Robert* delivered the deeds to his son, with a full knowledge of his intention to raise money upon the same. That if Sir *Robert*, in fact, delivered the title deeds to his son, or allowed him to become possessed thereof without any express knowledge of his intention to raise money upon the security of the same, yet that, by having invested his son with the custody of the title deeds, under the circumstances stated, he enabled him to commit a fraud on the Plaintiffs, and ought now to be bound by the acts and dealings of his son therewith.

Before any interrogatories had been filed, the Plaintiffs gave notice of motion for an injunction to restrain the proceedings at law, and no interrogatories had, in fact, been filed until the present day (8th *May*).

Sir *Robert* filed an affidavit, which stated as follows: "Intending that my son, Sir *John*, should, after my decease, enjoy this property, it occurred to me that it might be the means of saving some trouble at my death, and avoid the chance of the deeds being mislaid, if I at once placed them in the custody of my son, and I therefore delivered the deeds to him, explaining to him my intention and object, that I wished this property should always remain in my family." "I deny that I ever, directly or indirectly, at any time whatsoever, agreed to allow my son to raise money on the security

security of the deposit of the title deeds of the property." He also denied that he ever authorized his son to deposit the deeds as a security for any advances made or to be made by the Plaintiffs or any other person.

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Mr. *Terrell*, in support of the motion. First, the Defendant is bound to give a discovery by answer, and the Plaintiffs are entitled to an injunction in the meantime; *Senior v. Pritchard* (a); *Lovell v. Galloway* (b). Secondly, the affidavits of the Plaintiffs and Defendant shew a sufficient *prima facie* case to entitle the Plaintiffs to an injunction.

Mr. *R. Palmer* and Mr. *Schomberg*, *contrà*. There are no interrogatories on the file, and therefore the rule does not apply. The case alleged by the Plaintiffs is positively denied by the Defendant, and therefore the Plaintiffs are not entitled to an injunction on the merits.

*The MASTER of the ROLLS*: My impression is, that if the discovery will not be a defence at law, and there is an equitable case, the Court requires judgment to be given, and stays execution.

Mr. *Terrell*, in reply.

*The MASTER of the ROLLS*.

I am of opinion, that there is no case for the injunction. It is clear how the matter stands; if interrogatories had been filed, and the Plaintiffs sought a discovery of facts which might furnish a defence to the action at law, the present practice of the Court would entitle them to the same benefit as under the old practice, that

(a) 16 *Beav.* 473.

(b) 17 *Beav.* 1.



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that is, to a full discovery. The case made by the Plaintiffs is not a defence to the action at law, any injunction were granted, it must be on equitable grounds, and on the Plaintiffs giving judgment in the action. The case made by the bill is, that an equitable mortgage was made by the son and was sanctioned by the father; but this is positively denied by the Defendant. The son had no interest in the property, and the bill is, that at law there is nothing to prevent Sir J. from recovering the deeds. If the Plaintiffs made good that the deeds had been deposited by the son, that would not be a mortgage of the property against the father. If the Defendant should recover the deeds without paying the money advanced by the Plaintiffs, the father, by their losing possession of the deeds would not prevent them from still insisting, in equity, that there was a co-mortgage by the father as well as the son, that this property should be mortgaged to them.

This is no case for an injunction. Let the costs of the motion be costs in the cause, in order that we may see if the Plaintiffs should ultimately establish their right.

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1855.

## LANE v. JACKSON.

BY a deed dated the 23rd of *November*, 1849, some freeholds were conveyed to *Wallis* and others, in fee, subject to redemption on payment by *John Brewer* of 1,200*l.*

In 1850, *John Brewer* mortgaged the same property to the Defendant *Jackson*, for securing 1,300*l.*, subject to the prior mortgage.

In *January*, 1851, the Plaintiff *Lane* obtained a judgment against *John Brewer*, which was duly registered under the statute 1 & 2 *Vict.* c. 110, s. 19, on the 7th of *July*, 1851.

In 1851, *Jackson* purchased from *John Brewer* the equity of redemption of the property for 150*l.*, and it was conveyed to him, subject to the first mortgage for 1,200*l.*, by a deed of the 5th of *September*, 1851, to which *Turnbull* was a party.

The Plaintiff instituted this suit in *March*, 1852, against *Jackson* alone, insisting that the Defendant and his solicitor, Mr. *Turnbull*, had notice of the Plaintiff's judgment, at the time of the purchase of the equity of redemption. He alleged that *Turnbull* had searched for judgments, or if not, that he had wilfully omitted to do so, in order not to be affected with notice of the judgments against *John Brewer*. The

*May* 25, 26.

An estate was mortgaged to A., and afterwards to the Defendant; the Plaintiff subsequently obtained a registered judgment against the mortgagor. The Defendant then purchased the equity of redemption, without searching for judgments. On a bill to charge the equity of redemption with the judgment, the Court held, that the defence of "purchase for valuable consideration without notice" was available in this case; secondly, that, on the evidence, no notice was proved; thirdly, that it was not incumbent on a purchaser to search for judgments.

bill

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~  
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bill prayed a declaration, that the amount of the judgment was a charge on the estate, that the estate might be sold, and the proceeds applied in payment of the Plaintiff's judgment debt.

The Defendant positively denied having had any notice of the judgment, but it appeared, that on the purchase and previously thereto, *Turnbull* had been employed as the solicitor both of *Jackson* and *Brewer*.

*Brewer*, in his affidavit, made on behalf of the Plaintiff, deposed as follows :—" Previous to the completion of the sale to the Defendant, considerable negotiations took place between me and *Turnbull*, with respect to such sale, and as to the price, &c., and ultimately, in or about the beginning of the month of *September*, 1851, I had a conversation with *Turnbull*, relative to the sale of my property, subject to the charges thereon, when, in the course of such conversation, *Turnbull* informed me to the effect following :—that he could procure me 150*l.* for my interest therein, adding, that if I would not take that sum, I should get nothing. In reply to which, and with reference to the insufficiency of the said sum of 150*l.* to free me from my judgment debts, I said to *Turnbull*, the words or to the effect following :—What am I to do with the judgment ? (thereby meaning and alluding to the judgment of *Richard Kirkman Lane* and others), when *Turnbull* answered, ' You must manage as well as you can.' "

This conversation was as positively denied by *Turnbull*. He also denied all notice of or suspicions of any judgment of the Plaintiff. He said, " I did not search the registry of judgments for judgments against *Brewer*, and it is not my custom or practice, when concerned for a purchaser or mortgagee, to cause the said registry

registry of judgments to be searched for judgments against the vendor or mortgagor. I most positively say that I did not omit to search, in order that the Defendant should not be affected, by reason of such search, with notice of judgment against *Brewer*, or from any other improper motive; but I omitted to make such search conformably with my usual custom and practice, and because I did not consider the same to be necessary."

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There was some evidence of *Turnbull* having, in *May*, 1850, witnessed a consent to a judge's order, in a suit of *Nesfield v. Brewer*, to *Nesfield's* signing final judgment against *Brewer*, in case his debt should not be paid on the 8th of *July*, 1850. It did not, however, appear what was done upon it.

The cause now came on for hearing.

*Mr. R. Palmer* and *Mr. Flather*, for the Plaintiff. First, the Defendant *Jackson* states, that he had no notice of the Plaintiff's judgment, but that is immaterial, because the interests are equitable, and the charges rank according to their dates.

Secondly, *Turnbull* was solicitor both to the vendor and purchaser; he was a party to the deed of *September*, 1849, and was aware of the state of *Brewer's* affairs, and of the pending judgment in *Nesfield v. Brewer*. He had either actual notice of the judgment, or must be deemed to have had constructive notice, for, contrary to the universal practice in such cases, he wilfully abstained from searching the registry, purposely to defeat *Brewer's* judgment, by shutting his eyes to its existence.

*Attorney-General v. Wilkins (c).*

There was no obligation to search the registry that were so, the law would impute notice of that might be ascertained from the search, words, the registry would itself be notice to all which it undoubtedly is not. You must show intentional omission to search, for the sake of notice, and this is not proved. The 2 *Vict.* was introduced by Lord *St. Leonards*, for the purpose of relieving purchasers for valuable consideration who are not to be affected by registered judgments extensively than they were formerly by dockments.

*The MASTER of the ROLLS.*

If it were the duty of purchasers to search the registry of judgments, there would always be notice. There is no evidence that the *cognovit* in *Brewer* resulted in a judgment against *Brewer*. None appears to have been registered. I will now dispose of the case to-morrow.

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case is this:—The Plaintiff had a judgment against *Brewer*, and some time after the judgment had been entered up and registered, *Brewer* sold his estate, which was an equity of redemption, to *Jackson*, the Defendant. *Jackson* says he is a purchaser for valuable consideration without notice. If he be, I have already held, that such a defence is applicable to equitable as well as to legal titles upon the authority of a case decided by Lord *St. Leonards*. The Defendant is therefore entitled to the benefit of the doctrine, if he had no notice.

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If he had any notice, it must have been constructive notice through *Turnbull*, who acted as the solicitor of *Brewer* and of the Defendant in the transaction relating to the purchase of the equity of redemption. *Turnbull* having, in *September*, 1851, acted for both parties, it is said, that all the information which he had at that time, as solicitor of *Brewer*, he had also as solicitor of *Jackson*. The only question is, whether *Turnbull* had notice of the Plaintiff's judgment. He asserts that he had not.

The burden of proving notice lies on the person who asserts it, viz., the Plaintiff; and the evidence on which he relies consists of a passage in the evidence of *Brewer*, and this passage is to this effect:—"Previous" &c. . . . "what am I to do with the judgment?" [whether this word is "judgments" or "judgment," in the plural or singular, I do not know]. This conversation is positively and distinctly denied by *Turnbull*.

I have frequently stated, that where the positive fact of a particular conversation is stated to have taken place between two persons of equal credibility, and one states positively that it took place and the other as positively denies it, I believe that the words were said,  
 and

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and that the person who denies their having been said has forgotten the circumstance. By this means I give full credit to both parties. But in this case, if I believe that these words were said, they amount to nothing. The question is as to a judgment duly entered up and registered, with respect to which *Brewer* says, "What am I to do with the judgment?" speaking of debts generally; I could not hold that these words even expressed notice of a judgment having been entered up and registered. He says, *Turnbull* informed me "to the effect following" . . . [*His Honor here read the passage stated, ante, page 53,*] "my judgment debts." That he only refers to debts is obvious from this, if it were of any importance.

*Turnbull* swears positively, that he did not know of the judgment, and that these words were never said. In that state of things, it would be going too far to say, that client or solicitor to be fixed with notice of a registered judgment.

On the whole, I think there was no notice to the Defendant, *Jackson*, of the Plaintiff's registered judgment, and the result is, that the bill must be dismissed with costs.

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NOTE.—Under the 1 & 2 Vict. c. 110, s. 13, a judgment operates as a charge on the real estate of the debtor, but the charge cannot be enforced for twelve months. The statute, though it gives this charge, unfortunately provides no means of preserving it, or of preventing the judgment debtor aliening the land, for valuable consideration, to a purchaser without notice, and thus (as in the case in the text) defeating the charge. It is, perhaps, possible, by instituting a suit for the protection of the creditor's interest and registering a *lis pendens*, to prevent the charge from being thus defeated. See *Bristed v. Wilkins*, 3 Hare, 235; *Watts v. Jefferyes*, 3 Mac. & Gor. 372; *Reece v. Taylor*, 5 De Gex & Sm. 480.

1855.

## GERRARD v. BUTLER.

May 26.

**B**Y the settlement made on the marriage of Mr. and Mrs. *Fowler*, in 1788, a sum of 3,000*l.* was provided for the younger children of the marriage, to be paid at such times, in such shares, and subject to such conditions as Mr. *Fowler* and Mrs. *Fowler* jointly, or the survivor of them, by any deed or will should appoint; and, for default thereof, then to be equally divided amongst such children.

On the 6th of *December*, 1816, Mr. and Mrs. *Fowler* appointed to their daughter *Elizabeth* one-sixth of the fund, which was settled by her marriage settlement, dated the 7th of *December*, 1816, upon her and her husband, successively for life, and after the death of the survivor, upon trust for all their children, in such shares as they or the survivor of them should appoint, and in default of appointment then share and share alike.

Mrs. *Fowler* survived her husband, and by her will (after mentioning her settlement and that of her daughter *Elizabeth*) she appointed two-sixths of the fund as follows: unto and equally among my said younger children, *Elizabeth Gerrard*, *Richard Butler*, *Sarah Fowler* and *William Fowler*, the shares of my said daughter *Elizabeth*, to be upon such trusts as are declared of her former portion in her said marriage settlement, and to be accordingly paid to the trustees thereof therein named."

The share thus appointed to *Elizabeth* was represented

Where there is an absolute appointment to *A.*, an object of the power, followed by a qualification limiting the interest of *A.* to a life interest, with remainder to persons not objects of the power, the latter being void, *A.* takes absolutely, under the prior appointment. A testatrix, having a power to appoint a fund to her children, appointed it in this form:— Amongst my children, *A.*, *B.*, *C.* and *D.*, the share of *A.* to be upon the trusts of her marriage settlement, and to be paid to the trustees thereof. *A.* was the only person in the marriage settlement within the power. Held, that she took her share absolutely.



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sent by a sum of 277l. 15s. 7d. £3 per Cents. The Plaintiff, who was the legal personal representative of *Elizabeth Gerrard*, who had died in 1839, now claimed the fund.

Mr. *Roupell* and Mr. *Wynne*, for the Plaintiff. There is, in the first instance, a valid and absolute appointment to *Elizabeth Gerrard*, and there is a subsequent invalid attempt to modify the gift, which, being in favour of grandchildren and beyond the power of the testatrix, is void. The prior absolute appointment to *Elizabeth* remains; *Ring v. Hardwick* (a); and her representative is therefore entitled to the fund.

Mr. *Cary*, *contra*. In *Ring v. Hardwick*, and similar cases, there was an absolute gift, in the first instance, followed by an attempt to control it, in an independent passage; but here the whole appointment and its modification are contained in one sentence, and the direction that the appointed fund shall be subject to the trusts of the settlement forms an essential portion of the gift itself, and cannot be separated from it. The fund is to be paid to the trustees, to be held on certain trusts; this makes a distinction in the construction of such gifts, as was pointed out by Lord *Cottenham* in *Lassence v. Tierney* (b). Lord *St. Leonards* observes, "we should be careful how to apply this doctrine; for where the absolute apparent gift is explained to be only a life interest, to which are added void gifts, we might be led to suppose, that a gift to an object of the power for life, with a gift over to his children not objects of it, would vest the absolute property in the object; which is contrary to the settled rule."—*Sugden on Powers* (c). The result is, that Mrs. *Gerrard* took for life only.

He

(a) 2 *Beav.* 352.

(b) 1 *Mac. & Gor.* p. 565.

(c) Vol. 2, p. 74 (7th edit.)

He referred to *Kampf v. Jones* (a); *Peard v. Kekewich* (b); *Chambers v. Brailsford* (c); *Holliday v. Overton* (d).

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Mr. Osborne and Mr. Biron, for other parties.

The MASTER of the ROLLS.

These cases depend on nice distinctions, and one case is seldom an authority for another, for they turn much on the particular expressions used. I think, however, that the principle which governs these cases may be drawn from the cases of *Carver v. Bowles* (e); and *Ring v. Hardwick* (f). The question is this: whether the words of appointment are sufficient to vest the property in the objects of the power absolutely, with a superadded condition not warranted by the power, or whether the superadded terms constitute an essential part of the gift itself. Applying the rule to this case, I think that they are superadded words, and not words forming part of the original gift. The direction that the fund shall be held on the trusts of the daughter's settlement is by a distinct and separate sentence and forms no part of the gift to Mrs. Gerrard. If it had been, "I direct one-fourth of the appointed fund to be paid to the trustees of the settlement of my daughter, Mrs. Gerrard, upon the trusts of her settlement," I should not have doubted that the appointment was to all the objects of that settlement, and therefore void, except so far as Mrs. Gerrard was interested. But the words are these:—The remaining two-thirds, &c., I appoint unto "my said younger children, Elizabeth Gerrard,

(a) 2 Keen, 756.

(b) 15 Beav. 166.

(c) 18 Ves. 368.

(d) 14 Beav. 467.

(e) 2 Russ. & Myl. 301.

(f) 2 Beav. 352.

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*Gerrard, Richard Butler, Sarah Fowler and William Fowler.* This is a simple appointment amongst these four persons. The next part of the sentence, "the share of *Elizabeth* to be upon such trusts," &c., &c. clearly forms no part of the appointment to her other three children, and therefore forms no part of the appointment amongst the four. There is an absolute appointment to the four, and the testatrix then goes on to say, "the share of *Elizabeth* to be upon such trusts," &c. What share? Why, the share which she had just appointed to be held on the trusts of her settlement, "and to be accordingly paid to the trustees therein named." It appears to be an absolute appointment, with a superadded direction in what manner the share of *Elizabeth* created by the previous appointment, complete and perfect in itself, is to be held. It is the same as if she had appointed a share absolutely to *Elizabeth*, and then added a direction, that it was for her for life and afterwards to go to her children; or had then repeated the trusts of the settlement, limiting the fund to her husband for life, and afterwards to their children. It is something superadded to the absolute appointment which had previously taken place.

I am of opinion, in this case, that the words of the appointment are sufficient to vest the share in her absolutely, and that the superadded direction is one which cannot be maintained, and is void. The result is, that the legal personal representative of Mrs. *Gerrard* is entitled to the fund.

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NOTE.—See *Stephens v. Gadsden*, ante, p. 463.

1855.

*In re* THOMSON.

May 23, 24,  
30.

THE Petitioner, Mrs. *Lowe*, employed Mr. *Thomson* as her solicitor, from *July*, 1853, to *February*, 1855, when she discharged him and retained other solicitors. Mr. *Thomson's* bill of costs being paid, he handed over to the new solicitors the deeds, books, papers and writings belonging to the Petitioner, except the original letters addressed to and received by him as the Petitioner's solicitor, and relating exclusively to her business, and except copies of letters written by him as the Petitioner's solicitor, and exclusively relating to her business, which copies had been made by him and had not charged for in his bill of costs. These he declined to deliver up, but he offered to furnish copies of both classes of letters at the expense of the Petitioner. This proposal being unsatisfactory to Mrs. *Lowe*, she presented a petition for the delivery up of these letters and copies, and which she alleged were important to her interests.

On payment of a solicitor's bill, the client is entitled to the possession of letters written to the solicitor by third parties, but not to copies of letters written by the solicitor to third parties, unless they are paid for by the client.

*Seem*, that a solicitor is entitled to retain the original letters written to him by his client.

Mr. *Waller*, in support of the petition. First, the letters written to the solicitor on his client's affairs were received by him and are now in his possession, as the solicitor and agent of his client. They belong therefore to the client, and, the pecuniary claims of the solicitor being fully satisfied, the Petitioner is entitled to their possession. Secondly, the copies of the letters written by the solicitor were made in the usual and proper discharge of his duty, and they are as important to the client as the original letters to which they are answers. They belong to the Petitioner and their possession is es-

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essential in order to understand and to explain the correspondence which has taken place relative to her affairs. They form part of her documents, and it would be a great hardship to compel her to pay for copies of documents already made.

*Mr. Morgan, contra.* The solicitor has the property or at least a qualified property in the letters sent to him, and he is entitled to retain possession of them; *Pope v. Curl* (a); *Gee v. Pritchard* (b). They do not belong to the client and would not come within the terms of the common order for delivery "upon oath of all deeds, &c., belonging to the Petitioner." As to the copies of the letters written by the solicitor, they were made in his letter book, for his own protection and justification, and at his own expense, for they were neither charged for in the bill of costs nor paid for by the client. Charges for copies of such letters are never allowed upon taxation. If the client requires copies, she must bear the expense of making them. He referred to an unreported case of *Ex parte Bosville*, before Baron *Parke*.

*Mr. Waller*, in reply. As to the copies of the letters in question, the petition does not allege, in words, that they are charged for, but it does so inferentially, for the copies are, in fact, taken and retained solely for the benefit of the client, and they are considered and paid for in the charge for the letters themselves. If the solicitor desires copies of any of the letters, for his own purposes, he may take them at his own expense.

*The MASTER of the ROLLS.*

I am at present of opinion, that the copies of letters written by the solicitor and copied in his own letter book cannot be ordered to be given up, and that if the client

(a) 2 *Atk.* 342.

(b) 2 *Swanst.* 415.

client wants copies of them, she must pay for them, but as to the original letters, I shall reserve my judgment.

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*The MASTER of the ROLLS* in substance said :—

*May 30.*

The copies made by the solicitor of letters written by him to third parties, on his client's business, were made for his own benefit and protection, and were neither charged for by him, nor paid for by his client. If therefore the client requires copies, she can only have them on the terms of paying for them.

No question arises as to the letters from the client to her solicitor, but my impression is, that the solicitor would be entitled to retain them.

As to the letters written to the solicitor by third parties, relating exclusively to the client's business, I think that they having been received by the solicitor as the agent of the client she is entitled to have them delivered up to her. My decision is in no way founded on any questions of copyright or qualified ownership.

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1855.

*In re* BAKER.

## BAKER v. BAKER.

June 9.

The testator gave his real and personal estate, on trust to raise such a sum of money, as when invested, the dividends would realize the clear annual sum of 200*l.* a year, and to pay such dividends to his widow for life, and afterwards to stand possessed of the principal or trust monies in trust for his brothers and sister. There was a gift to the same person of the residue, "after raising thereout the money sufficient to realize the annuity to his wife." On a deficiency of assets, held, that the *corpus* was liable to make good the widow's annuity.

THE testator gave all his real and personal estate to his brother, *Alfred Baker*, upon trust, to convert the same into money, and stand possessed of the proceeds, "upon trust to raise thereout and invest in the parliamentary stocks or funds of *Great Britain*, or upon mortgage or other good security, *such a sum of money as*, when so placed out or invested, the dividends or interest thereof *shall realize the clear annual income of 200*l.**; and do and shall pay to, or permit and suffer my said wife, *Elizabeth*, to take and receive such dividends, interest or annual income, by two half-yearly payments, for and during the term of her natural life, provided she shall so long continue my widow, but not otherwise. And from and after her decease or second marriage, whichever shall first happen, it is my will and I further declare, that in case I shall die without issue, the said trustee shall stand possessed of the said principal or trust monies, and the stocks, funds and securities in or upon which the same shall be invested, upon trust for himself and my other brothers, *Walter Baker* and *James Baker*, and my sister, *Louisa*, the wife of *Thomas Grant*, in equal shares and proportions."

There was a residuary clause giving the residue of the trust monies arising from his real and personal estate and effects (*after raising thereout the money sufficient to realize the annuity for his said wife*), to the testator's brothers and his sister.

There

There was also a proviso, that in case the testator died leaving issue, the bequests to his brothers and sister should be void, and that instead thereof his children should take the trust monies.

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In this suit, the accounts, &c., were taken and the only available residue, when invested in consols, would only produce 100*l.* a year. There were some outstanding assets apparently irrecoverable. The question therefore arose, on further consideration of the cause, whether the deficiency of the 200*l.* a year ought, or ought not, to be made up out of the *corpus* of the residue.

Mr. *Shebbeare*, for the Plaintiff, the widow, insisted, that deficiency of the income to meet her annuity of 200*l.* a year ought to be made good out of the *corpus* of the residue. He relied on *Wright v. Callender* (a).

Mr. *J. H. Palmer*, for the Defendant, argued, that the income of the fund was alone liable to pay the annuity.

The MASTER of the ROLLS was of opinion, that this case was governed by *Wright v. Callender*, and that he was bound to follow that decision; he declared, therefore, that *Elizabeth Baker* was entitled, during her life or widowhood, to the full amount of the annuity of 200*l.* bequeathed to her, and to have the difference between that sum and the amount of the dividends arising from the residue made good out of the *corpus* of the fund.

(a) 2 *De G. Mac. & G.* 652; *Russ.* 370; *Mills v. Drewitt*,
and see *Hodge v. Lewin*, 1 *Beav.* *post*, p. 632, and *Ingelman v.*
431; *Swallow v. Swallow*, 1 *Beav.* *Worthington, V. C. Kindersley*,
p. 432, n.; *May v. Bennett*, 1 20th Nov., 1855.

NOTE.—On appeal to the Lords Justices, they differed in opinion, and the decision was affirmed. An appeal to the House of Lords is said to be pending.

1855.

STAEHLE v. WINTER.

July 2, 3.

A. B., being entitled to a share of the produce of a testatrix's real and personal estate, instituted a suit for its recovery and obtained a decree. *C. D.* afterwards filed a bill of revivor and supplement, stating that *A. B.* was domiciled at *Stuttgart*, and that by a decree of the Court there, he had been appointed "*curator bonorum*," and directed to get in the property for *A. B.*'s creditors. The bill prayed a revivor, and liberty to prosecute the original suit, for payment and additional relief. A general demurrer was allowed, on the ground that the relief thus prayed could only be obtained by original bill.

THIS was a demurrer to a bill, praying a revivor. The effect of the statements in the present bill, which set out at length the original bill, was as follows:—

Matilda, the wife of *Frederick Lesinger*, was entitled to one-fourth of the produce of the residuary real and personal estate of *Mrs. Warren Hastings*. In 1854, *Frederick Lesinger* and *Matilda* his wife instituted a suit in this Court against the executors and devisees in trust, for an account and payment of their share. In that cause (*Lesinger v. Winter*) a decree was made on the 7th of *March*, 1855, whereby "divers accounts and inquiries were directed," but the decree had not yet been prosecuted, and it omitted to direct any account of the monies produced from the sale of the said real estates, or of the timber thereon, or of the timber and fir poles cut down, as prayed by the 4th and 6th paragraphs of the prayer.

Some part of the said share or inheritance of the said *Matilda Lesinger* had been paid under the directions of this Court to the said *Matilda Lesinger* or her husband.

The said Defendants, *Frederick Lesinger* and *Matilda* his wife, are now and always have been resident and domiciled at *Stuttgart*, in the kingdom of *Wurtemberg*, and were married there, and are subject to the jurisdiction of the Royal Town Court of *Stuttgart*, and, by the laws of *Wurtemberg*, the share or inheritance of
Matilda

Matilda Lesinger is subject to the payment of divers charges and debts, and the Royal Town Court of *Stuttgard* is the proper and most convenient *forum* for the administration and disposal of the said shares or inheritance according to due course of law.

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v.
WINTER.

By a decree or order of the Royal Town Court of *Stuttgard*, upon a report duly made of the state of the debts of *Frederick Lesinger* and his wife, and which decree or order is dated the 17th of *March*, 1855, the Plaintiff was duly appointed provisional *curator bonorum*, and the Plaintiff was thereby directed to take proceedings in *London*, so that the said inheritance belonging to the said *Matilda Lesinger* should be placed at the disposal of the Town Court of *Stuttgard*, or at least, so that the same should not be paid to *Matilda Lesinger*, or to any person by her order, until it should have been shewn that the creditors have been satisfied; "as by the said decree or order to which the Plaintiff craves leave to refer, or by a proper translation thereof, will appear."

By a further decree of the Town Court of *Stuttgard*, dated the 2nd day of *May* last past, the Plaintiff was absolutely appointed *curator bonorum* of the said property, and was directed, forthwith, to take the necessary steps to call in the said inheritance which had reverted to *Matilda Lesinger*, for the security of the creditors, and to receive and bring the same under the control of the Town Court of *Stuttgard*, as the competent Court for the administration thereof, as by the said last-mentioned decree, or a proper translation thereof, will appear.

The bill prayed,

"1. That the suit and proceedings in *Lesinger v. Winter*

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Winter might be revived, and stand in the same plight and condition as the same were prior to the Plaintiff being appointed such *curator bonorum*, or assignee as aforesaid.

"2. That the Plaintiff might be at liberty to carry on and prosecute the said suit and proceedings as directed by the decree, or as the Plaintiff might be advised, in respect of the produce of the sale of the real estate, and of the timber and fir poles.

"3. That the share of *Matilda Lesinger* might be paid to the Plaintiff, or otherwise placed at the disposal of the Town Court of *Stuttgart*, or otherwise that the same might not be paid to *Lesinger* and wife, until the executors, who had charges thereon, according to the laws of *Wurtemberg*, had been duly satisfied."

The executors and *Lesinger* and wife, when within the jurisdiction, were made Defendants to this bill.

The executors demurred for want of equity.

Mr. *Roupell* and Mr. *Bevir*, in support of the demurrer. First, the Plaintiff has no *locus standi* according to his own statement. He alleges that he is *curator bonorum*, an office unknown to and unrecognized by the English law. He does not state that he is assignee, or that any title whatever is vested in him, except the duty of receiving the produce of the suit. He is a mere receiver, and even as an incumbrancer *pendente lite*, a common stop order is all that he is entitled to. Secondly, there is no abatement or defect in the original suit, and there is nothing to justify a bill either of supplement or revival; even if there were, then, by the statute 15 & 16 Vict. c. 86, s. 52, the imperfection ought to be cured by an

an order of course. Thirdly, as to the alleged omission with respect to the timber in the decree, which is set out in the bill, it can only be remedied by rehearing or by bill of review, in which case the leave of the Court is necessary. Lastly, *Lesinger* and wife, who are resident at the same place as the Plaintiff, are not properly made parties; process is merely prayed against them when they shall come within the jurisdiction; they ought to be served.

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STAEBLE
v.
WINTER.

Mr. *R. Palmer* and Mr. *Haig*, *contrà*. Any person obtaining a charge or incumbrance on a property has a right to file a bill to enforce it, even *pendente lite*. The office of *curator bonorum* is well known: he is an assignee, and in that character is entitled to the future conduct of the debtor's suit. The Court construes a foreign instrument by its plain import; *The King of Spain v. Machado* (a); and the answer of the Defendant will more clearly shew its proper construction. The law of the domicile of *Lesinger* and wife regulates their rights; *Story's Confl.* (b); and the bill shews, that the Plaintiff now properly represents them according to the law of *Stuttgart*. The Plaintiff is at least entitled to relief respecting the timber, and if that be so, the general demurrer to the whole relief cannot be supported.

The MASTER of the ROLLS.

I do not think that this bill can be sustained. The case alleged by the bill is that some change in the interest of the Plaintiff has taken place. The Plaintiffs to the original bill were entitled to one-fourth of the residuary estate of the testatrix. This bill alleges, that by the foreign law, the creditors of the husband and wife are entitled to have a charge on it, and that the Plaintiff

is

(a) 4 *Russ.* 225.

(b) Sect. 376.

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is appointed by the Court of *Stuttgard curator bonorum* to enforce payment of the charge : that appears to be the fair effect of the allegations of the bill. I must therefore look on the Plaintiff in the light of a person having a charge on the share of the residuary legatee; but I do not know a case, in which it has been held that a person, having obtained *pendente lite* a charge on a residue, may file a bill to revive or to amend the decree already made and make the charge available. If the money be in Court, the usual course is to obtain a stop order against payment of any part of it to the Plaintiff without notice. If the fund be not in Court, the usual practice is to give notice to the trustees not to pay it to anybody; and if there is reason to apprehend that the trustee will not act on that notice, it is undoubtedly in the power of the person who has obtained a charge to file a bill to enforce his security and have benefit of any decree in the suit. But that this must be an original bill, in the strict sense, appears from what is stated by Lord *Redesdale* (a). He says:—"If a sole Plaintiff, suing in his own right, is deprived of his whole interest in the matters in question by an event subsequent to the institution of a suit, as in the case of a bankrupt or insolvent debtor, whose whole property is transferred to assignees, or in case such a Plaintiff assigns his whole interest to another, the Plaintiff being no longer able to prosecute for want of interest, and his assignees claiming by a title which may be litigated, the benefit of the proceedings cannot be obtained by a supplemental bill, but must be sought by an original bill in the nature of a supplemental bill." Here the bill, if any, ought to be an original bill, and should pray the benefit of the former proceedings.

If I were to overrule this demurrer I should be holding
 that

(a) Pages 65, 98 (4th edit.)

that a bill of revivor and supplement might be instituted, **after** decree, where the whole interest of the Plaintiff has **been** parted with. If that be not allowed, it cannot be **allowed** where the transfer is partial.

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STABLE
v.
WINTER.

Allow the demurrer.

FINCH v. SHAW.
COLYER v. FINCH.

AT the hearing of the causes, on the 18th of *July*, 1854 (a), a decree for foreclosure was made in the **first** suit, and the second was dismissed with costs. The **decree** was passed on the 31st of *October* following, and **Colyer**, having enrolled the decree, appealed to the **House of Lords** on the 14th of *December*. It now stood **17** in the list, and there was no prospect of its being **heard** the present session of Parliament. The account **has** been taken in chambers, and a day appointed for **pay-**
ment. It was now moved, on behalf of the Defendant **Colyer**, that the time appointed to redeem might be **enlarged**, until ten days after his appeal to the **House of Lords** had been heard and judgment given thereon.

July 3.
The time ap-
pointed for re-
demption en-
larged, on
terms, pending
an appeal to
the House of
Lords.

It appeared that *Finch* was in poor circumstances, **living** on monies borrowed on the security of the **pro-**
perty; and it was sworn, and not contradicted, that if the **money** were paid, it would never be recovered back from **him**, in the event of the decision on the Appeal being **in** the Appellant's favour.

Mr. *C. Hall* and Mr. *Mott*, in support of the motion.
Mr.

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v.
SHAW.
COLYER
v.
FINCH.

Mr. *R. Palmer* and Mr. *Osborne*, *contrà*. *Monkhouse* v. Corporation of *Bedford* (a); *Way* v. *Foy* (b); The Mayor &c. of *Gloucester* v. *Wood* (c); *Sturge* v. *Sturge* (d); *Seton on Decrees* (e) were cited.

The MASTER of the ROLLS.

My only doubt has been as to the costs of the suit. I think I must order *Colyer* to pay into Court the principal and interest found due on the mortgage security (4,558*l.*). I must then direct it to be invested, and the dividends to be paid to *Finch*, on his undertaking to repay them if the decree should be reversed, and *Colyer* must at once pay the costs of suit and of this application. Thereupon I will enlarge the time to redeem until the 1st of *June*, 1856, with liberty to apply.

Mr. *R. Palmer*, the investment must be at the risk of *Colyer*.

The MASTER of the ROLLS.—That must be so (f).

(a) 17 *Ves.* 380.

(b) 18 *Ves.* 452.

(c) 3 *Hare*, 150.

(d) 2 *Hall & Tw.* 469.

(e) Page 142, 1st edit.; p. 182, 2nd edit.

(f) *Broughton* v. *Pitchford*, 6

Madd. 295; *Taylor* v. *Waters*, 1

Myl. & Cr. 266; and *Bridger* v.

Wickens, V. C. *Stuart*, 3 Dec.

1855

1855.

MARRIOTT v. TURNER.

THE testator, after certain devises, &c., devised the residue of his real estate to a trustee in fee, in trust to accumulate the rents "until such time as one of his grandsons thereafter named should attain the age of twenty-one years," and to apply such accumulated fund in the manner thereafter directed; and in case his grandson, *Thomas Hyde Marriott*, should live to attain the age of twenty-one years, then the testator directed his trustee and his heirs to stand seised of his residuary real estates, in trust to pay the future rents and profits thereof to the Defendant, *Thomas Hyde Marriott*, during his life, with remainder to his eldest son who should attain twenty-one, and in default to his grandson *Joshua Marriott*.

July 4.

A testator devised the residue of his real estate to a trustee, until one of his grandsons attained twenty-one; and in case his grandson *Thomas* attained twenty-one, in trust to pay him "the future rents." He bequeathed to the same trustee the residue of his personal estate to accumulate until one of his grandsons attained twenty-one; and he directed payment of "the aggregate" of the residue of his personal estate and its accumulations and the accumulations of the rents to his grandson *Thomas*, from and after his attaining twenty-one. There was an interval of three years between the

And he bequeathed the residue of his personal estate to the same trustee, in trust, "until one of his said grandsons attained twenty-one," to accumulate. And he directed his trustee to stand possessed of the residue of his personal estate, and the accumulations thereof, and also of the accumulated fund to be produced from the rents and profits of his residuary real estates," in trust to pay the dividends, interest and proceeds of the aggregate amount of the residue of his personal estate, and of such accumulation as aforesaid, unto *Thomas Hyde Marriott*, from and after his attainment to the age of twenty-one years, during his life," and after his

decease

eldest grandson and *Thomas* attaining twenty-one. Held, that the rents during that interval were undisposed of and passed to the heir at law.

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 MARRIOTT
 v.
 TURNER.

decease to pay the principal of the residue of his personal estate and of such accumulations as aforesaid, to the eldest or only son of the body of *Thomas H. Marriott*.

The testator died in 1837. *Joshua*, the eldest grandson, attained twenty-one in *August*, 1847, and *Thomas* attained twenty-one three years after, viz., in *August*, 1850.

Mr. *R. Palmer*, for the heir at law. The eldest grandson attained twenty-one three years before *Thomas* attained a vested interest. The rents, therefore, during the interval of three years, are undisposed of and belong to the heir. The rule is different as to the personal estate. He referred to *In re Drakeley's Estate* (a); *Cunningham v. Murray* (b).

Mr. *Prendergast*, for a granddaughter.

Mr. *Freeling*, for *Turner*.

Mr. *Follett* and Mr. *Wickens*, for *Thomas H. Marriott*, *contrà*. The intention of the testator was manifestly the same both as regards the real and personal estate, and it is admitted, that as to the personal estate, the intermediate income passed; the same result must, therefore, follow as to the rents of the real estate during the three years. The real and personal estate are here blended together, and the "aggregate amount" is given; the case, therefore, falls within the authority of *Genery v. Fitzgerald* (c), where the residue

of

(a) 19 *Beav.* 395.

(b) 1 *De G. & Sm.* 366.

(c) *Jacob*, 468.

of real and personal was given to the eldest of three children who should attain twenty-one; and it was held, that the intermediate rents and profits of the real estate passed, as well as the interest of the personalty. Again, the whole fee is given to the trustee, which shews, that the testator did not intend to die intestate. The intention of the words, "until such time as one of my grandsons shall attain the age of twenty-one years," is, until one shall become entitled in possession, under the subsequent gift, and, in the event which has happened, they refer to *Thomas's* attaining twenty-one, in which case there will be no interval or intermediate period.

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Mr. Humphreys, for John Marriott. "Future rents" mean all those accruing subsequent to the eldest grandson attaining twenty-one.

The MASTER of the ROLLS.

I think these rents are undisposed of. I cannot arrive at the conclusion, that the testator has made a disposition of them, without introducing some words into the will and re-modelling and qualifying the expressions used by him. The words "until one of his grandsons thereafter named should attain twenty-one" cannot be a description of any particular grandchild, but means any one of them attaining twenty-one. The testator says, in case *Thomas* should live to attain twenty-one, then the trustee shall pay him "the future rents." These cannot be future to his brother attaining twenty-one, but must be future or after his own attaining that age. It would be contrary to grammar and construction to say it refers to rents three years prior to his becoming entitled. The testator has left an interval between the elder grandson's attaining twenty-one

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twenty-one and the younger becoming entitled, during which the rents are undisposed of. He might have introduced words which would have given these rents to the grandson *Thomas*, but I am of opinion, that I am not at liberty to introduce any such words.

TUER v. TURNER.

July 4.

Though no assignment can be made of the reversionary interest of a married woman, so as to bind her, in the event of the death of her husband in her lifetime, and before it falls into possession, yet a perfect conveyance may be made by her and her husband, under the Fines and Recoveries Act, of a reversionary interest in the produce of real estate directed to be sold.

THE testator (*a*), after providing for his widow, ordered, after the decease of *Barbara Bell*, his widow, "all his property and effects to be sold, and the money accruing out of the same to be disposed of in manner following:"—he then, in effect, gave one-eighth of "the whole of his then personal property" to *Sarah Tuer*, afterwards the wife of *William Elliott*.

The testator died in 1830. He had real as well as personal estate.

In *December*, 1836, *William Elliott* and *Sarah* his wife, by deed of lease and release, duly acknowledged under the Fines and Recoveries Act (*b*), conveyed to *Hugh Elliott* all that one-eighth of *Sarah Elliott* in the hereditaments and premises devised by the will.

William Elliott died in the lifetime of the testator's widow, and she died in 1852, leaving *Sarah Elliott* surviving her, whereupon the real estates became saleable. The simple question was, whether the conveyance
 of

(*a*) See same case, 18 *Beav.* 185. (*b*) 3 & 4 *Will.* 4, c. 74, s. 77.

of the reversionary interest was valid as against Mrs. *Elliott*.

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Mr. Hobhouse for the trustees.

Mr. Shebbeare for *Sarah Elliott*. It is clearly settled, that the assignment by a married woman and her husband of a reversionary interest in a *chose in action* is unavailing against her if she happens to survive her husband. Here the testator's real estate was, by his will, imperatively "ordered" to be sold, and was thereby converted, out and out, into personalty. The interest of *Mrs. Elliott* was therefore a reversionary interest in personal estate expectant on the death of the tenant for life, and it is so treated by the testator, who disposes of it as "the whole of my then personal property." This interest, therefore, was not assignable by her under the provisions of the Abolition of Fines and Recoveries Act (3 & 4 Will. 4, c. 74). The Vice-Chancellor *Knight Bruce*, in *Hobby v. Collins*(a), was of that opinion. He said, "It appears to me doubtful, at least, whether *Mrs. Hughes'* right to her 250*l.* will be affected by what has been done, if she shall become a widow in her mother's lifetime. The point is not new to me, as I have had occasion more than once to think of it;" and he directed the fund to be paid into Court, and the income only paid to the married woman. As the property here is personal and reversionary, and did not fall into possession pending the coverture, the assignment of it is not binding on *Mrs. Elliott*.

Mr. Bagshawe, junior, for the representative of the assignee. The question is not whether, in equity, this real estate is converted into personalty or whether it is reversionary

(a) 4 De G. & Sm. 293.

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 Turner.

reversionary, for this is admitted, but the real point this : whether the Fines and Recoveries Act enables married woman to dispose of it? The 77th section authorizes her to dispose of any estate "which she alone, or she and her husband in her right, may have in any lands of any tenure." By the interpretative clause (a), the word "estate" is made to extend "any estate in equity as well as at law," and to "an interest, charge, lien or incumbrance in, upon or affecting lands, either at law or in equity." The produce of a sale of land clearly comes within this definition.

In *May v. Reper* (b) a married woman, being entitled to a share of the proceeds of real estate directed to be sold, joined with her husband in assigning and levying a fine of her share to a mortgagee, and it was held, that she was barred of her equity to a settlement. The Fines and Recoveries Act is only a substitute for the former mode of passing a married woman's estate and interest in land, and does not narrow but rather extends her right of disposition. It gives her a power to dispose of land of any tenure, of money to be invested in lands, of any estate or interest in lands either at law or in equity.

Now so long as the land is unsold the act applies, and it is an equitable interest in Mrs. Elliott. *Hobby Collins* was a surprise upon the profession, and is inconsistent with *Briggs v. Chamberlaine* (c), where a testator gave real estate to trustees, upon trust to sell and to pay the proceeds to the children of A. B., upon the youngest child attaining twenty-one. One of the children, a married woman, with her husband, mortgaged her share and interest by a deed duly acknowledged pursuant

(a) Sect. 1.
 (b) 4 Sim. 360.

(c) 23 Law Journ. (Ch.) 635.

the Fines and Recoveries Act, it was held, that the interest of the married woman passed by the mortgage. He cited *Forbes v. Adams* (a); *Sugden's Real Prop. Stat.* (b); 1 *Jarman on Wills* (c).

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MR. Shebbeare, in reply.

***The* MASTER of the ROLLS.**

I must follow the later decision. The right to the proceeds of land directed to be sold certainly gives a married woman an equitable interest in the land.

I must follow the decision of Vice-Chancellor *Wood*, who seems to have decided the case of *Briggs v. Chamberlaine* after he had taken time to consider the decision in *Hobby v. Collins*.

(a) 9 *Sim.* 462.

(b) Page 240.

(c) Page 538.

OLDFIELD v. COBBETT.

July 10, 11.

THE Defendant, *Cobbett*, was the executor of his father. The Plaintiff, a creditor, instituted this suit against him, on behalf, &c., for the administration of the estate; and, on motion before decree (27th of August, 1855), the Defendant was restrained, by injunction, from further directions. The executor afterwards brought actions against the Plaintiff, for debts alleged to be due from him to the testator, which the Court restrained by injunction. The Plaintiff having died, the Defendant moved, that the suit might be revived by his representatives, or, in default, that the injunctions might be dissolved. The proceeding was held irregular, and the motion was refused with costs.

The Plaintiff instituted a creditors' suit against the executor. The estate was accordingly administered, and a decree was made on

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from getting in the personal estate and effects of the testator, and a receiver was appointed. The usual decree was afterwards made for the administration of the estate, and (as it was stated) the injunction and receiver were thereby continued. The Master made his report. Exceptions were taken thereto, which were overruled, and a decree on further directions was made in 1841, but the injunction and receiver were not thereby continued (a).

The Defendant *Cobbett* afterwards brought an action against the Plaintiff *Oldfield*, to recover 5,000*l.*, which, as he alleged, was due from the Plaintiff to the testator's estate. On the 7th of *June*, 1842, an injunction was granted to restrain the action (a). The Defendant repeated the same proceedings, and a further injunction was granted on the 28th of *July*, 1843 (b).

The Plaintiff *Oldfield* afterwards died.

The Defendant, in person, now moved, that the injunction granted on the 7th of *June*, 1842, and that granted on the 28th of *July*, 1843, might be dissolved, unless the suit should be revived by his representatives within such time as the Court should appoint. He cited *Lee v. Lee* (c); *Daniel's Prac.* (d).

The MASTER of the ROLLS.

I will give judgment to-morrow.

The MASTER of the ROLLS.

July 11.

The authorities cited in support of this motion are inapplicable;

(a) 5 *Beav.* 132.
 (b) 6 *Beav.* 515.

(c) 1 *Hare*, 617.
 (d) Page 1427 (2nd edit.)

applicable; this is quite a different case. Here a decree was made for the administration of the testator's estate; and it appears, by the report of the Master, which is now before me, that the decree continued the injunction to restrain the Defendant from collecting the assets, and the Receiver. The order was, therefore, made by the decree. Subsequently to that, Mr. *Cobbett* brought an action against *Oldfield*, and an application being made to this Court (a), Lord *Langdale* said, "He had no hesitation in granting an injunction." This order was affirmed on appeal by the Lord Chancellor. [Mr. *Cobbett*. Not that order.]

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Then it remains unreversed. Afterwards, in 1843, the matter was again brought forward (b), when Lord *Langdale* said, "After the estate of the testator has been fully administered in this Court, and every opportunity given to the Defendant, the executor, to examine every charge on the estate, and every particular constituting the estate, he cannot be permitted, without the leave of the Court, to commence an action to recover from the Plaintiff a portion of the testator's property." Either the order for the injunction then made remains untouched, or was affirmed by the Lord Chancellor.

It appears to me, that this application which is made to me is perfectly novel, viz. that I should call on *Oldfield's* representatives either to revive the suit, or that these injunctions should be dissolved. Here the injunctions are perfectly regular, and no application has been made either for leave to take any proceedings at law or to discharge them. There are various other circumstances in the case; the Master's report found what the property

(a) 5 *Beav.* 132.

(b) 6 *Beav.* 515.

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perty consisted of; the Defendant took exceptions, which, on the 12th of *May*, 1841, were overruled, and the report was confirmed. It appears, therefore, to me, that it is proper that the matter should remain as it stands; and, moreover, that I have no power to alter or remove these injunctions.

Refuse the motion with costs.

NOTE.—See 2 *Daniel's Pr.* (2nd edit.), 1543; *Yeomans v. Kilvington*, 1 *Dickens*, 351; *Askew v. Townsend*, 2 *Dickens*, 471.

KAY v. SMITH.

July 10.

A Plaintiff who has required a Defendant to make an affidavit as to the possession of documents, under the 15 & 16 *Vict.* c. 86, s. 18, may afterwards compel the Defendant to be cross-examined on such affidavit, under the 40th section.

UNDER the 15 & 16 *Vict.* c. 86 (a), the usual order was, on the 25th of *November*, 1854, made on the Defendant, to file an affidavit, stating whether he had in his possession or power any documents relating to the matters in question and for their production (b).

The Defendant accordingly, on the 11th of *December*, filed an affidavit. The Plaintiff thought it unsatisfactory, but upon a summons calling on the Defendant to make a better affidavit, it was held to be sufficient in form.

The Plaintiff then served the Defendant with a *sub-pœna* to attend the Examiner, and be cross-examined on his affidavit. The Defendant attended, but refused to be examined, on the ground that the proceeding was irregular.

(a) Sect. 18.

(b) See the form of order, *Ordines Can.* 532, 533.

irregular. A motion was now made that the Defendant might attend and be cross-examined on his affidavit.

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SMITH.

Mr. *R. Palmer* and Mr. *Dickinson*, in support of the motion. By the 40th sect. of the 15 & 16 *Vict.* c. 86, "*any party* having made an affidavit, to be used or which shall be used on any claim, motion, petition or other proceeding before the Court, shall be bound to attend before an examiner, for the purpose of being cross-examined." This section applies to every case.

If the Plaintiff had proceeded under the old practice, he might amend his bill and in that way sift the matter, and the proper mode of obtaining a similar benefit under the new practice, by a much less expensive process, is by a cross-examination. An answer is equivalent to an affidavit (sect. 59), and it has been held, that a Defendant may be cross-examined on his answer.

Mr. *Roupell* and Mr. *Speed*, *contrà*. First, the affidavit in question is not within the 40th section, for it was made at the instance of the Plaintiff and for his benefit. This is an application by a party to cross-examine his own witness, which is clearly irregular and has never yet been allowed; you can cross-examine an adverse witness, but not a person whose evidence you are yourself using.

Secondly, this affidavit has been held to be sufficient, and is a full compliance with the requirement of the statute and the exigencies of the order of the Court, which is merely to make a satisfactory affidavit.

Thirdly, the Plaintiff has accepted and acted upon the affidavit, and has had the production and inspection of the documents, he has therefore waived any further right; and, fourthly, the 40th section only applies where
"any

1585.



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"any cause or matter is depending," and here the cross-examination is not in furtherance of any pending proceeding before the Court, for the order has been made and complied with.

The MASTER of the ROLLS.

I think the case is within the 40th section. The objection raised to a cross-examination on this affidavit would equally apply to an answer, which may be used on a notice of motion for a decree, and which I have held is to be treated as an affidavit, and renders the Defendant liable to be cross-examined on it. This affidavit may be used for the purpose of obtaining the production of documents in the Defendant's possession, and I am of opinion that it comes within this act, which provides that a person making any affidavit shall be liable to a cross-examination on it, in case the opposite party requires it.

SMITH v. BAKES.

July 5, 12.

A testator, who died in 1833, bequeathed two cottages to his executor, in trust to sell and retain a debt due to him from the

testator, and hold the surplus for other persons. The executor never proved the will, but retained the property in discharge of his debt. He bequeathed it by his will, and it was enjoyed by the tenant for life thereunder until 1852. A legatee in remainder under the second testator afterwards instituted a suit to recover the cottages, which was resisted by a person claiming under the will of the first testator. The executor's debt was alleged to be 300*l.*, and the value, according to one side, was 300*l.*, and on the other, 360*l.*, but the value of the property had lately greatly increased from local circumstances. The Court, notwithstanding the lapse of time, granted relief by ordering a sale.

THOMAS FENTON the elder, being possessed of two leasehold cottages, at *Bradford*, by his will, dated in *May*, 1830, gave his leasehold cottages and personal property to his son, *Thomas Fenton* the younger,

younger, on trust "to sell the cottages, for the best price that he could obtain, either by private contract or public auction, which he should think proper, as soon after his decease as conveniently could be done, and out of the money thence arising, to reimburse himself or retain for his own use the sum of 154*l.*, which he, *Thomas Fenton* the elder, borrowed of him some years before the date of his will, to pay the executors of the then late *Jane Hudson*, also to reimburse himself, *Thomas Fenton* the younger, for funeral expenses, proving of his will, and the maintenance of him the said *Thomas Fenton* the elder and his wife, since the 11th day of *September*, 1829, at the rate of 15*s.* per week, during the then remainder of his, *Thomas Fenton* the elder's, life." "And if there was any remaining surplus, after the above payments were deducted, he willed that it should be equally divided amongst" *Thomas Fenton* the younger, the Defendant *James Fenton*, his grandchild, and two other persons. And he appointed *Thomas Fenton* the younger his executor.

1855.



SMITH
v.
BAKES.

The testator died in *August*, 1833, his son, *Thomas Fenton* the younger, never proved his will, but he took possession of the two cottages in satisfaction of the debt due to him from his father, the testator, and the maintenance of 15*s.* a week, which, according to his calculation, amounted to 307*l.*

Thomas Fenton the younger, by his will, dated in 1839, bequeathed the two cottages upon trust for his wife for life, with remainder to his daughter for life, with remainder to the Plaintiff. He died in *March*, 1839, and his will was proved by the Defendants, *Bakes* and *Ackroyd*. After the death of *Thomas Fenton* the younger, the rents were received by the tenants for life under his will until the death of the survivor in 1852.

The

1855.

SMITH
v.
BAKES.

The Defendant *James Fenton* afterwards obtained letters of administration, with the will annexed, of the estate of *Thomas Fenton* the elder, and he brought an ejectment to recover the two cottages, but failed (a), on the ground that *Thomas Fenton* the younger had assented to the bequest of the leasehold to himself.

The Plaintiff, claiming as devisee under the will of *Thomas Fenton* the younger, instituted this suit against *Bakes* and *Ackroyd*, (the executors of *Thomas Fenton* the younger,) and *James Fenton*, (the administrator of *Thomas Fenton* the elder,) to recover the two cottages and the rents accrued due since the death of the tenant for life.

The value of the two cottages at the testator's death was, according to the Plaintiff's witnesses, 300*l.*, and according to the Defendant's witnesses, 360*l.*; but the property had since considerably increased in value, in consequence of its being near a railway station.

Mr. *Lloyd* and Mr. *Humphry*, for the Plaintiff. The executor had a right to appropriate and retain any part of the assets in satisfaction of his own demand, and he did retain this property, which was not of a greater value than 300*l.*, in discharge of his debt. The costs of sale would merely have created a loss without benefiting the legatees. At this distance of time the transaction cannot be impeached; *Roberts v. Tunstall* (b).

Mr. *Pearson* and Mr. *Ellis*, for trustees.

Mr. *C. C. Barber*, for *James Fenton*. *Thomas Fenton* the younger was a trustee, and he acted as such, though he never proved the will; that is established by the action

(a) *Fenton v. Clegg*, 9 *Exch. Rep.* 680.

(b) 4 *Hare*, 257.

action at law, which was decided on his having assented to the bequest. He could not, therefore, purchase the trust estate. The trust now exists and must be performed. There have been no laches or concurrence on the part of *James Fenton*, who was only thirteen years of age when the first testator died, and, as the will was not proved, he did not become aware of his rights until 1853. He cited *Lord v. Wightwick (a)*.

1855.

SMITH

v.

BAKER.

Mr. *Lloyd*, in reply. The executor has a right of retainer over every species of property for the payment of a debt due to him by the testator. It is a legal right, subject to the inquiry as to the *bona fides* of the transaction.

The MASTER of the ROLLS.

If the executor had proved the will, I should have thought that there was very little doubt, considering the lapse of time. I will, however, consider the case.

The MASTER of the ROLLS.

July 12.

The Defendant, *James Fenton*, contends, that *Thomas Fenton*, the younger, was a trustee of these cottages, and that the trusts ought now to be performed. The Plaintiff on the other hand contests the claim, on the ground that *Thomas Fenton* the younger took these cottages in discharge of his debt, and having done so, so long ago as 1833 (now upwards of twenty years), this Court will not open the transaction, particularly as there is evidence to shew, that the cottages were not then worth more than the debt, and that *Thomas Fenton* would not have benefited the

(a) 4 De G. Mac. & G. 803.

1855.

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v.

BAKES.

the legatee by selling, but would simply have injured himself to the extent of the expenses of the sale. It was possible, that for the same reason, he neglected to prove the will, and in confirmation of this view, it is observed, that the legal personal representatives of *Thomas Fenton*, the elder, brought an ejectment to recover these cottages, and that he failed, on the ground, that on the evidence, it appeared, that *Thomas Fenton*, the younger, had, as executor of his father, assented to the bequest to himself, and that, therefore, the legal estate was not in the administrator *de bonis non*. This, however, leaves the question of trust wholly untouched, and though, considering the lapse of time, I should be rejoiced if I could leave the matter undisturbed, yet I do not see how I can arrive at that result. *Thomas Fenton*, the younger, had a trust to perform and was bound to perform it, and any one interested might have insisted on its performance, unless he had bound himself by laches or acquiescence. Acquiescence on the part of *James Fenton* there is none, for *Thomas Fenton*, the younger, not having proved the will, he did not enable *James Fenton* to ascertain his rights and interests.

Roberts v. Tunstall and other cases were cited, in which the Court has refused to set aside a transaction in which the trustee had bought the property. *Roberts v. Tunstall* was the only case that goes to that extent, but it is to be observed, that there the sale took place with the knowledge of every body interested, and a considerable interval of time had elapsed since the purchase.

Persons who undertake a trust must really perform it, and I am of opinion, that I cannot resist the right which *James Fenton* has to have the trust now executed, notwithstanding the length of time which has elapsed,
the

The circumstance of the case being, that *Thomas Fenton*, the younger, has kept the property as his own, instead of selling it and ascertaining what it would produce. I do not mean to say, in coming to this conclusion, that in a case in which it was tolerably clear, that the property was not nearly sufficient to pay the debt, I should open the transaction at the end of so long a time; but so far as I can make out from the evidence, the cottages were worth about 300*l.*, being the amount claimed by the executor to be due to him, while the Defendant's evidence is, that they were worth 360*l.* The only mode of testing the value was by a sale, and they might have sold for more.

1855.


SMITH
v.
BAKES.

In this state of things, though the Court will exercise a discretion in these cases, I think I am bound to perform the trusts of the will.

I cannot direct any account of rents received by the mother, for she is dead and not represented here, and under the circumstances I cannot treat these trustees as guilty of a breach of trust in allowing her to take the rents under the will of *Thomas Fenton*, the younger.

I must direct the cottages to be sold and the proceeds to be disposed of according to the trusts of the will of *Thomas Fenton*, the elder; and for that purpose I must take an account of the rents and profits of the cottages received by *Thomas Fenton*, the younger, making all just allowances, and an account of what was due to him in respect of his debt and the funeral expenses and any debts he may have paid, and an account of the personal estate, and the balance must be made good by his estate.

1855.



RE TEMPLEMAN.

July 13.

Personal service on a solicitor of proceedings under a taxation dispensed with, and service by placing under his door substituted.

AN order was made, on the application of the client, for the taxation of a solicitor's bill, and the delivery up of the papers. The bill was taxed and, including the costs of taxation, a balance was found due to the client.

The solicitor having avoided personal service of the Taxing Master's certificate, and kept the door of his chambers closed,

Mr. *Karslake* applied for an order for substituted service.

The MASTER of the ROLLS ordered, that putting a copy of the Master's certificate through or under the door of the solicitor's chambers, together with a copy of the present order, should be deemed good service.

1855.

HALL v. CLIVE.

July 17.

THE bill was filed by *Hall* and *Brown*, against *Clive* and others. *Brown* was a mortgagee under *Hall*, and claimed the legal estate.

A suit having been instituted by *A.* and *B.*, his mortgagee, as co-Plaintiffs, *B.* died before decree. It was ordered, on motion, that *A.* might carry on the proceedings against *B.*'s executors and devisees.

Before decree, the Plaintiff *Brown* died, having appointed five executors, and devised the mortgage estate to two of them.

Mr. *C. Hall* moved, under the 15 & 16 *Vict.* c. 86, s. 52, for an order of revivor and supplement, that the surviving Plaintiff might carry on the proceedings against the five executors and the two devisees. He said, that against the executors, it was a mere case of revivor, but the difficulty was as regarded the devisees, against whom, by the old practice, a supplemental decree could not have been obtained upon a defect prior, which occurred before decree. He cited *Lash v. Miller (a)*, in which case, upon the bankruptcy of the Defendant before the hearing, the Lord Chancellor ordered that the Plaintiff might be at liberty to prosecute the suit against the assignees, without filing a bill of revivor or supplemental bill.

The MASTER of the ROLLS.

You may take an order that the surviving Plaintiff may carry on the proceeding against the executors and devisees.

(a) 19 *Jurist*, 457.

NOTE.—*Heath v. Lewis*, 18 *Beav.* 527; *Edwards v. Batley*, 19 *Beav.* 457.

1855.

RE WHALLEY.

July 2, 14.

By error and mistake, some items were omitted from, and others undercharged and overcharged in, a bill of costs, referred for taxation. On a petition by the executor of the solicitor, liberty was given to insert the omitted items and increase those undercharged, but he was not allowed to decrease the overcharges, and the costs of the application were ordered to be paid by the Petitioner.

Pending a taxation, both the solicitor and client died, the reference was revived, and the taxation continued between the representatives.

IN *December*, 1849, the usual order was made upon *William Whalley*, a solicitor, to deliver his bill of costs against *Cole*, his client, and for its taxation. The bill was delivered after considerable delay, but *Cole* died in 1851, and *Whalley* in 1852, before the bill had been taxed.

By an order of the 3rd of *March*, 1854, made upon the petition of the executor of *Cole*, it was ordered, that the order of *December*, 1849, and the proceedings thereunder, should be revived, and that the taxation thereof directed should be carried on between the executor of *Cole*, and the executor of *Whalley* (a).

The Master proceeded to tax the bill, but before he had completed it, the executor of *Whalley* presented a petition, stating, that by error and mistake, there were, in the bill delivered by *Whalley*, certain undercharges, overcharges, and omissions, which he specified by reference to some documents, and that on the taxation the Master had made improper disallowances in the bill of costs. The Petitioner stated, "That he was desirous of rectifying the items of undercharge, by increasing or enlarging the same, of amending the items of overcharge, by decrease thereof, of inserting such omissions in the bill now under taxation, and of carrying in before the said Master an additional bill of items of business done by *Whalley* for *Cole*, omitted to be charged in the bill

(a) *Hand's Pr.* 252.

bill already delivered, subject to the taxation by the Master, and that the Master might review his taxation as to the items of allowance.

1855.

Re
WHALLEY.

The petition prayed, that the items of undercharge might be increased, the overcharges decreased, and the omissions inserted in the bill now under taxation, and that an additional bill of items of business done by *Whalley* for *Cole*, omitted to be charged in the bill already delivered, might be carried in before the Master, subject to his taxation ; that the Master might be ordered to review his taxation as to the said items of disallowance, and that the executor of *Cole* might be further ordered to pay what the Master should report due to the Petitioner on such additional bill.

The Petitioner in person supported the petition. He referred to *In re Walters* (a), in which case, " pending a taxation, leave was given, upon special application, to carry in an additional bill for specified items of undercharge and omission, arising from error and mistake."

Mr. J. H. Taylor, *contra*. *Re Catlin* (b) was cited.

The MASTER of the ROLLS. I propose to consult the Taxing Master. I think the Petitioner will not be allowed to diminish any of the items, and he must deliver to the Court and to the Respondent a list of items which he wishes to increase and to add.

The

(a) 9 *Beav.* 299.

(b) 18 *Beav.* 519 ; and see *ibid.* n. (a).

1855.

Re
WHALLEY.
July 14.

The MASTER of the ROLLS.

After consulting the Taxing Master, and looking into the list of new items, I am of opinion that the Petitioner should be at liberty to deliver a new bill of the omitted items and to increase the undercharges, but this ought not to affect the question of the costs of the taxation, under the existing order of reference.

Beyond this, the petition must be dismissed, that is, so far as it prays for liberty to decrease the items, to review the taxation, and for payment of what may be found due on the additional bill. So far as the Petitioner asks to alter the bill already delivered, by increasing the undercharges and adding omitted items, the Petitioner may be at liberty to do so within a fortnight.

Refer the matter to the same Taxing Master, who is not to regard these new matters in relation to the question of the costs of taxation under the old order.

The Petitioner must pay the costs of the present petition.

1855.

MARKHAM v. IVATT.

KATHERINE SMITH, being possessed of a leasehold messuage in the parish of *St. Mary*, in *Cambridge*, bequeathed it to two trustees, upon trust for the separate use of her daughter *Ann*, the wife of the Plaintiff *Thomas Markham*, and to convey it as she should by deed or will appoint; "and in default of any such direction, appointment, gift or bequest, then upon further trust that her trustees, from and immediately after the decease of *Ann Markham*, should dispose of the said leasehold estates, or so much thereof as should remain unappointed and undisposed of by her, to and amongst the nearest kindred of her" [*Katherine Smith*], "precisely in the manner directed by the statute made for the distribution of intestates' effects."

Katherine Smith died in 1833, leaving *Ann Markham* her sole next of kin.

In 1846, *Ann Markham* made her will, and she thereby bequeathed her two leasehold messuages in *St. Giles*, *Cambridge* (being the whole of her leasehold property, exclusive of that in *St. Mary's*), unto the Plaintiff, her husband, for life, and directed that after his decease, the same should form the residue of her leasehold estates thereafter bequeathed. And, after making

July 23.
A. bequeathed a leasehold for the benefit of B., and gave her a power to appoint it by will, and, in default, to A.'s "nearest of kindred, precisely in the same manner directed by the statute made for the distribution of intestates' effects." On B.'s death without appointment, held, that the next of kin of A. at her own death, and not those at the death of B. were entitled.

A testatrix having two leaseholds, at X. and Y., bequeathed those at X. to one for life, and directed, that after her decease, they should "form the residue of her leasehold estates there-

inafter bequeathed." She then bequeathed all the residue of her leaseholds, "whatsoever and wheresoever," not thereinbefore otherwise disposed of. Held, that the leaseholds at Y. also passed under the residuary gift.

The term "nearest of kindred," with reference to the Statute of Distributions, has the same meaning as "next of kin."

1855.
MARKHAM
v.
IVATT.

making divers other devises and bequests, Mrs. *Markham* devised and bequeathed "all the residue and remainder of her freehold and leasehold messuages or tenements, lands, hereditaments, estate and premises, whatsoever and wheresoever, not thereinbefore otherwise disposed of, and over which she had any disposing power by her will, unto *James Ivatt* and *Robert Emson*, their heirs, &c., upon trust, at such time, after the decease of her husband, as to them should seem most expedient, to sell and stand possessed of the produce, upon trust to pay the several legacies therein mentioned.

Mrs. *Markham* died in 1847, and at her decease the Defendant *Ann Cotton* was one of the "nearest kindred" of *Katherine Smith*. As such she claimed an interest in the leasehold premises in *St. Mary's*.

This bill prayed a declaration of the rights of the parties to the leasehold in *St. Mary's*, and for a declaration that the Plaintiff was entitled thereto, absolutely or for life.

Mr. *Beales*, for the Plaintiff. The leasehold in *St. Mary's* belonged to Mrs. *Markham*, as sole next of kin of her mother, and formed part of her estate at her decease. It was not appointed by her will, nor is it comprised in the residuary gift, for the testatrix expressly directs, that the leaseholds in *St. Giles's* alone "shall form the residue of her leasehold estates thereafter bequeathed." The *St. Mary's* leasehold, in default of appointment, belonged to Mrs. *Markham*, as next of kin of her mother, and being undisposed of, passed to the Plaintiff *jure mariti*. Secondly, "nearest of kindred, precisely in the manner directed
by

by the Statute of Distributions," is the same as "next of kin" according to the statute, and they must be ascertained in the same way, namely, at the death of *Katherine Smith*; *Elmsley v. Young* (a); *Lasbury v. Newport* (b); *Gundry v. Pinniger* (c); *Cable v. Cable* (d); *Say v. Creed* (e).

1855.

MARKHAM
 v.
IVATT.

Mr. *Forster*, for *Ann Cotton*. There having been no execution by Mrs. *Markham* of the power given her by her mother's will, the *St. Mary's* leasehold passed under the ultimate limitation in Mrs. *Smith's* will to her "next of kindred;" *Anderson v. Dawson* (f). This expression differs from the term "next of kin." The period of division is the time for ascertaining the class, and therefore the persons who were nearest of kin of Mrs. *Smith*, living at the death of Mrs. *Markham*, are entitled; *Tiffin v. Longman* (g); *Jones v. Colbeck* (h). The testatrix desires a division to be made; that would be impossible if the Plaintiff's construction be correct, for she had an only child, who would have taken solely and exclusively. It is impossible that the testatrix could have meant, that on the death of her daughter without making an appointment, the property should pass to her husband. Secondly, the residuary gift comprises everything not before disposed of.

Mr. *Goren*, for the trustees.

The MASTER of the ROLLS.

My opinion is against the Plaintiff, on the will of *Ann Markham*. The residuary gift is too large to be cut down

(a) 2 *Myl. & Keen*, 780.
 (b) 9 *Beav.* 376.
 (c) 14 *Beav.* 94.
 (d) 16 *Beav.* 507.

(e) 5 *Hare*, 580.
 (f) 15 *Ves.* 532.
 (g) 15 *Beav.* 275.
 (h) 8 *Ves.* 38.

1855.

MARKHAM
v.
IVATT.

down and limited in its operation to the two leaseholds in *St. Giles's*. The testatrix gives these two leaseholds in *St. Giles's* to her husband for life, and directs that after his decease the same shall form the residue of her leasehold estates thereafter bequeathed. She afterwards bequeaths the residue of her leaseholds, "whatsoever and wheresoever, not thereinbefore disposed of." Here is the largest possible residuary clause, and it includes a leasehold she had power to dispose of, and which had not previously been disposed of. I am of opinion that I cannot cut down the general disposition, and say that the *St. Mary's* leasehold is not included in the residuary gift.

If the dispositions were inconsistent, I must give effect to the latter (a). I think that the residuary clause comprises everything, and that after the death of her husband, it must be sold for the benefit of the persons named.

With respect to the other question, it appears to me to be the same question which I have had before. The gift is to the daughter, with a power of appointment, and in default to the *nearest of kindred* of *Katherine Smith*, "precisely in the same manner directed by the Statute" of Distributions. I am asked to distribute it not in the manner directed by the statute, but between persons who would have been the next of kin of *Katherine Smith*, if she had died at the same time as her daughter. I am of opinion that such a construction is contradicted by all the late decisions. The words "nearest of kindred," and "next of kin," have the same meaning when reference is made to the

(a) *Sherratt v. Bentley*, 2 *Brocklebank v. Johnson*, *ante*, p. *Myl. & K.* 149; *Co. Litt.* 112b; 205.

the statute. I think, therefore, that the daughter of Mrs. *Smith* took the leasehold as the sole next of kin of her mother.

1855.

MARKHAM
v.
IVATT.

Declare that the *St. Mary's* property is undisposed of during the Plaintiff's life, and that at his decease it passes under the residuary bequest contained in his wife's will.

BAYNARD v. WOOLLEY.

WEARING v. BAYNARD and WOOLLEY.

IN 1844, *Henry Wearing*, of *Truro*, assigned two policies and all moneys owing to him, to the Plaintiff, *Baynard*, and the Defendant, *Woolley*, in trust for himself for life, with remainder to his wife, *Catherine Wearing*, for life, with remainder to his son. The trustees were to invest the trust funds "in the parliamentary stocks or public funds of *Great Britain*, or at interest upon any other securities."

April 26.

There is no such general rule, that a wrong-doer cannot file a bill. Thereupon, if *A.* and *B.*, two trustees, have committed a breach of trust, and are equally liable, but *B.* received the produce, *A.* may sustain a bill against *B.* alone to recover the amount, for the benefit of the trust.

The settlor died shortly after, and the trustees, having received 400*l.* trust money, paid it into their bankers, but afterwards lent it to *Woolley*. *Woolley*, who also owed the trust a sum of 100*l.*, thereupon signed the following memorandum:—"15th May, 1845. I, *George Woolley*, do hereby acknowledge, that I am indebted to the estate of the late Mr. *Henry Wearing*, of *Truro*, the sum of 500*l.*, with interest on the same at 4*l.* per cent. per annum, holding the deeds of my house as a collateral security, and policies of insurance.

An informal document, signed by a trustee who was indebted to the trust, construed to amount to an equitable mortgage in favour of the

"*George Woolley.*"

The mortgage in favour of the

trust, notwithstanding a denial by the answer.

The Plaintiff, a tenant for life, having received five per cent. on an investment, which she knew to be and insisted was improper, was ordered to account for the excess beyond four per cent., for the benefit of the trust.

1855.

BAYNARD
v.
WOOLLEY.
WEARING
v.
BAYNARD
 and Another.

The title deeds of his house were at the time in the possession of the Plaintiff, *Baynard*, in respect of a debt due to another person, and secured on the same property by a term of 500 years.

Catherine Wearing was soon afterwards informed, that the money had been lent to *Woolley* on the above security, and she received the interest from him at 4l. per cent. from *May*, 1845, to *November*, 1846, and, at her request, it was raised to 5l. per cent. from *November*, 1846, to *May*, 1853, since which time no interest had been paid.

In *November*, 1846, *Wearing*, the son, conveyed all his real and personal estate to *Lloyd*, for the benefit of his creditors.

Baynard filed this bill against *Woolley*, *Mrs. Wearing*, her son and *Lloyd*, and prayed for the administration of the trusts, for the recovery from *Woolley* of the 500l. and the realization of the securities. The bill insisted, that *Catherine Wearing* had concurred in the loan and that her interest in the funds was answerable for any losses.

The second suit was instituted by *Mrs. Wearing* and her son, for the performance of the trusts and to make the trustees liable for the breach of trust.

Mr. Roupell and *Mr. E. Smith*, for the Plaintiff. First, *Woolley*, having received the trust money, must, in the first instance, be ordered to replace it. Secondly, *Mrs. Wearing*, by receiving the interest for seven years, has sanctioned the investment, and "as long acquiescence is equivalent to an original concurrence," her interest must be attached in order to reinstate the trust fund ; *Trafford v. Boehn*

v. Boehn (a); *Phillipson v. Gatty* (b); *Browne v. Cross* (c); *Booth v. Booth* (d).

1855.

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BAYNARD

v.
WOOLLEY.

WEARING

v.

BAYNARD
and Another.

Mr. Nalder, for *Woolley* and *Lloyd*, argued, first, that the instrument did not constitute an equitable mortgage; *Ex parte Finden* (e). Secondly, that the creditors' deed vested the estate in *Lloyd*, who had no notice of any prior charge, and therefore had priority; and thirdly, that a wrong-doer could not file a bill for contribution, the rule of law being clear, that, as between *tort feasons*, there is no equity. *Attorney-General v. Wilson* (f) was also cited.

The MASTER of the ROLLS.

I entirely dissent from the last proposition, that a wrong-doer can, in no case, file a bill. Take this illustration,—where two trustees, having the trust fund in their hands, divide it between them, and afterwards one of them says, “I have joined my co-trustee in committing a breach of trust, but I am ready and willing to pay into Court the whole of the trust fund, if no part can be recovered from the co-trustee.” This Court would undoubtedly compel the other trustee to make good the breach of trust, though the Plaintiff may have concurred in it, it being his duty to secure the trust fund for the benefit of the *cestuis que trust*, and to such a suit the trustees alone are necessary parties. The books are full of cases (g), in which the trustees have called on their co-trustees to replace funds, notwithstanding they have themselves been guilty of acts not in accordance with their

(a) 3 *Atk.* p. 444.

(b) 7 *Harc.* 531; 2 *Hall & Twiss*, 459.

(c) 14 *Beav.* 113.

(d) 1 *Beav.* 125.

(e) 11 *Ves.* 404, n.

(f) *Craig & Phill.* 1.

(g) *Lingard v. Bromley*, 1 *Ves.* & *B.* 114; *Franco v. Franco*, 3 *Ves.* 75; *Greenwood v. Wakeford*, 1 *Beav.* 576; *May v. Selby*, 1 *Y. & C. (C. C.)* 235; *Robinson v. Evans*, 7 *Jur.* 738; *Bridget v. Hames*, 1 *Coll.* 72.

1855.

BARNARD

v.

WOOLLEY.

WEARING

v.

BARNARD
and Another.

their duty. If, therefore, this were a case between two trustees, one calling on the other to make good the breach of trust, I should see no objection to the fram

As to the equitable deposit, the Defendant denies in his answer, that he did deposit the deeds with the Plaintiff; but the state of the case is this:—*Barnard*, one of the trustees, had in his possession the title deeds relating to *Woolley's* house as a security for another debt, and *Woolley* was aware of that fact. A trust fund of 400 being in the hands of the Plaintiff and *Woolley*, the Plaintiff suggests to *Woolley* that he should take this sum and employ it in his business. *Woolley*, who also owes the trust estate 100*l.*, accedes to this proposal, and on the 15th of May, 1845, signs a document, on an ordinary bill stamp, in the following words:—"I, *George Woolley*, grocer, of *Truro*, do hereby acknowledge, that I am indebted to the estate of the late Mr. *How Wearing*, of *Truro*, the sum of 500*l.*, with interest on the same at 4*l.* per cent. per annum, holding the deeds of my house as a collateral security, and policies of insurance."

What is the meaning of the words "holding the deeds of my house as a collateral security" for 500*l.*? What held them? Why, his co-trustee, to whom the document was given. The law is clear, that where there is a deposit of title deeds to secure a debt, the equitable mortgagee may by agreement add further advances to the amount for which they are deposited. The fact must be proved, but it need not be in writing. The burden does not rest on a parol allegation of one person denied by the other, for here, the last passage in the written instrument is susceptible of no other construction than this:—that the deeds were to be held by the Plaintiff

as a security for the 500*l*. This, in my opinion, constituted an equitable mortgage, and the estate, unless it has been disposed of, is chargeable with the money.

It is stated, however, that *Woolley* has conveyed the whole of this property to *Lloyd* for the benefit of his creditors. The deed is for value and without notice of the previous charge, but then it appears, that the legal term is now effectually vested in the Plaintiff, and *Lloyd* has merely the legal estate in the reversion expectant on the expiration of the term of 500 years. After that period he will, at law, become entitled to the property, and in equity as soon as the first mortgage has been satisfied; that is the extent to which he is entitled. As to the Plaintiff, I think he is liable to repay the whole trust fund if it cannot be recovered from *Woolley*.

I have now to consider the rights as between *Baynard* and *Catherine Wearing*, and having attended to the evidence, I do see nothing which amounts to an acquiescence by her in what had been done by the trustees, for the purpose of rendering her liable to make good the amount.

The point on which I wish to hear Mr. *R. Palmer* is, whether she, having had the benefit of investment, is entitled to relief, without repaying that which she has received beyond that which the fund would have produced if it had been in a proper state of investment.

Mr. *R. Palmer* and Mr. *Daunay*, for the widow, referred, on this point, to the terms of the power to invest, and to *Robinson v. Robinson* (a).

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(a) 1 *De G. Mac. & G.* 247.

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WOOLLEY.

WEARING

v.

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I cannot give her more than 4*l.* per cent. and I think I must make her account for the excess of income paid to her beyond the amount of interest at 4*l.* per cent. on the 400*l.*

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NOTE.—See *Lichfield v. Baker*, 13 *Beav.* 447; *Bate v. Hooper*, 5 *De G. Mac. & G.* 338.

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PARIENTE *v.* LUBBOCK.

July 2, 3, 4.

An agent is bound to act in the best manner he can for his principal, and in matters which are left to an agent's discretion, he can only act for the benefit of his principal.

A foreign merchant directed his correspondent in *England* to treat any consignment as his son's (who was in *Eng-*

*land* and superintended the sales and purchases), and to acknowledge him owner of the money, so that he might dispose thereof as if it was his own money. By the direction of the son, moneys in the hands of the correspondent, belonging to the father, were applied by him in paying a private debt of the son to the correspondent. Held (overruling the decision of the Master), that the transaction was valid.

IN 1837, the Plaintiff, *Jacob Pariente*, a merchant at *Tangiers*, employed the Defendant, Sir *John Lubbock*, and his late father, merchants in *London*, as his consignees and agents. The course of dealing between the Plaintiff and the *London* house was of this nature:—the Plaintiff consigned goods to the *London* house or to their correspondents abroad, the goods were sold, and the proceeds having been received by or remitted to the *London* house, were invested in the purchase of return cargoes, and these were sent, to or to the order of the Plaintiff. During these transactions, the Plaintiff's son, *Judah Pariente*, resided in *London*, and he superintended the purchases and sales, made there

there on the Plaintiff's account, and was allowed by the Plaintiff a commission for this superintendence. *Judah Pariente* also carried on business in *London* on his own account, and in the course of that business had large transactions with Messrs. *Lubbock*.

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In 1839, the Plaintiff wrote three letters to Messrs. *Lubbock*, which were relied on as evidencing the terms on which the agency was carried on. The first, dated the 18th *February*, 1839, proceeded thus:—"I beg of you, when I consign you any of my property, on my own account, that *you will consider it as the property of Judah, my son, and to acknowledge him owner of the money which you may have, at any time of mine.*"

Again, on the 27th of *February*, 1839, the Plaintiff wrote to Messrs. *Lubbock* in these terms:—"In my last of the 18th, I wrote to you by my son *Judah*, and now I confirm to you, that, any time that you may have any money of mine, *you may acknowledge my son Judah as myself, so that he may place and dispose of my money as if it was his own property*, and you will acknowledge him as the owner of the money." In another letter of the 2nd of *December*, 1839, there were expressions to this effect:—"In all my business, I hope that you will consult with my son *Judah*, for purchases as well as for sales, the same as if he was myself, and I have already written my said son that he must consult with you;" and further on in the same letter, he said, "I have a letter from *Joseph Pariente*, at *Gibraltar*, he says, that he ordered you, on the 31st of *October*, to insure the cargo for the nameless value 5,000*l.* I hope that you have done this in due time; and, as my son *Judah* informs me of every thing, I shall not continue my writing, and *whatever my said son may say for me is the same as if I said it myself*, which must guide you."

In



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In *October*, 1840, Sir *John Lubbock's* father died, and the mercantile business was afterwards carried on by Sir *John Lubbock* alone, and the agency between the Plaintiffs and the Defendant continued without any change.

Early in 1842, the Plaintiff consigned a cargo of goods in a vessel called the *St. Paul Serge*, to his correspondents at *Genoa*, who sold them, and in the month of *May*, 1842, remitted the proceeds (2,664*l.* 4*s.* 5*d.*) to the Defendant, Sir *John Lubbock*. At this time *Judah Pariente* was largely indebted to the Defendant on his private account between them, and on the 20th of *May*, 1842, the sum remitted from *Genoa* was placed by the Defendant to *Judah Pariente's* account, and thus *Jacob's* funds were applied in part liquidation of the debt due from his son, *Judah Pariente*, to the Defendant.

*Judah Pariente* (the son) became bankrupt in *January*, 1843. In taking the accounts between *Jacob* and the Defendant, in this Court, the question arose, whether the Defendant ought to be held discharged from the 2,664*l.* 4*s.* 5*d.* by its having been placed to the credit of *Judah's* account.

Master *Humphry*, in an elaborate judgment, held first, that the son had no authority to direct the produce of the cargo to be placed to the credit of his private account with the Defendant; that the object and effect of the Plaintiff's letters were merely to substitute the judgment and discretion of the son for that of the father, and solely for the benefit of the latter, and that the latter had been constituted *dux facti*, and not *dominus rerum*. Upon this point, he relied on *Story on Principal and Agent* (a). Secondly, that if the son had

(a) Sects. 21, 82, 83, 210.

had authority so to act, it had determined upon the dissolution of the partnership by the death of Sir *John Lubbock's* father. Thirdly, that, upon the evidence, it did not appear that the son had given any authority to the Defendant to place the amount to his private credit; and, fourthly, that the son had not subsequently ratified that act.

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To this finding the Defendant took exceptions, which now came on for argument.

Mr. *Roupell* and Mr. *Cairns*, for the Plaintiff, argued, first, that the Plaintiff had authorized the son to deal with the fund in the same manner as if it were his own. Secondly, that the change in the Defendant's firm did not affect the question, the agency having been continued on the same terms. Thirdly, that the transfer had been made by the son's authority, and had been subsequently ratified and confirmed by him. They cited *Neal v. Erving* (a); *Brockelbank v. Sugru* (b); *Todd v. Robinson* (c); *Gilman v. Robinson* (d); *Tickel v. Short* (e); *Willis v. Jernegan* (f); *Wyatt v. The Marquis of Hertford* (g).

Mr. *Lloyd*, Mr. *W. H. Clarke*, and Mr. *Dowdeswell*, for the Plaintiff, *contra*, argued, that the son was a mere agent and trustee for the father, and that he and the Defendant, with notice of the trust, had transferred the fund, not for the benefit of the principal, but in payment of the personal debt of the agent; that such a transaction could not stand, and that the Defendant could not take advantage of such a transfer; *Wilson v.*

*Moore.*

(a) 1 *Esp.* 61.

(b) 5 *Car. & P.* 21.

(c) *Ry. & M.* 217.

(d) *Ry. & M.* 226; 1 *Car. &*

*P.* 642.

(e) 2 *Ves. sen.* 239.

(f) 2 *Atk.* 252.

(g) 3 *East*, 147.

1855. *Moore (a)*. Secondly, that the son had never authorized the transfer; and thirdly, that there had been no ratification, and, as the transaction was wrong in its origin, it was incapable of ratification.

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They cited *Whitehead v. Tuckett (b)*; *Smith v. The East India Company (c)*; *De Bouchout v. Goldsmid (d)*; *Story on Principal and Agent (e)*.

*The MASTER of the ROLLS.*

Although I feel the utmost deference to the Master's judgment, I am bound to follow the view (which I regret to say differs from his) to which the careful consideration of the documents has led me.

The real question, in this case, appears to me to depend upon the construction of three letters, and the rights and powers given by them, and how the parties were bound to act in consequence of them.

The proposition on which the Master proceeded cannot be disputed, viz. that an agent is bound to act in the best manner he can for his principal (*f*), and that in matters which are left to his discretion, he can only act for the benefit of his principal. But it is also quite clear, that he is bound to follow the directions of his principal, and is not answerable for any injury which may occur, if he strictly and directly follow the instructions which are given him. For instance, there are many cases in which a principal abroad directs his agent in this country to hold a balance or a certain sum of

(a) 1 *Myl. & K.* 126, 337.

(b) 15 *East*, 400.

(c) 16 *Sim.* 76.

(d) 5 *Ves.* 211.

(e) Sect. 62.

(f) See *Bentley v. Craven*, 18 *Beav.* p. 77.

of money then in his hands, or the proceeds of a particular cargo, at the disposal of a stranger. If nothing be due to the agent he cannot help acting upon such an order, and he would be liable to an action, and to all the consequences which might follow to his principal, if he did not; if he communicates the order to the third person, then it amounts to a promise to pay, and an action would be maintainable against him on behalf of that third person; and that class of cases to which I referred yesterday, such as *Burn v. Carvalho (a)*, would then apply. I refer to them merely to point out that it is the duty of an agent to follow the direction of his principal, and that, subject to such rights as he may have, arising from the state of the account between himself and his principal, he is bound to do so; he never can be blamed for acting as directed by his principal, and he is liable to an action if he should not.

In the observations I am now making, I am assuming that the father at *Tangiers* was the principal, and that Messrs. *Lubbock* were the agents in *London*. But a principal may direct any other persons to give directions for him to his agent in *London*, and he may constitute that person his agent, or a sort of second principal, for the purpose of dealing with that agent; and if he choose to do so, the agent or mercantile house in *London* cannot be blamed for acting on directions so communicated to them. Now that case is perfectly distinct from those referred to by Mr. Justice *Story*, and on which the Master seems to have relied, and which shews the extreme difficulty of making an agent not merely the *dux facti*, but the *dominus rerum*. No doubt there is very considerable difficulty in doing so, but it is not disputed that it may be done. Accordingly,

(a) 4 *Myl. & Cr.* 690.

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ingly, if a father, employing a son as his agent in another country, thought fit to say to his son, "not only I give you the entire control and management of the business, but I make you a present of all the proceeds which may arise from it," he would make him not merely the *dux facti*, but the *dominus rerum*.

Sir *John Lubbock*, the agent of the father at *Tangiers*, was not made *dominus rerum*, but was bound to follow the directions of the father, or of that person whom the father had put in his place: but it is a perfectly new proposition to me to hear, that the principal abroad might not, if he thought fit, constitute, as between himself and his agent here, some other person to be a sort of second principal, in order to give complete directions to the agent in this country as to what he should do with the property.

If so, the only question is, whether he has done so in this case. On the 10th of *February*, 1839, the father writes, "I beg of you, when I consign you any of my property on my account, that you will consider it as the property of *Judah* my son." What is the meaning of that? I think it is impossible to put it lower than this, that it made the son joint owner of the property with himself. I do not put it so high as to say, that it made the son the exclusive owner, and that it would have justified Sir *John Lubbock* in saying, "we will not answer the father's drafts;" but it is impossible, after that, to say that he was not entitled to regard any property consigned by the father, on his own account, as the property of *Judah* the son. The letter goes on to say, "and to acknowledge him owner of the money which you may have at any time of mine."

Now there are two things here, "If I consign you  
 any

any property, you must consider him as the owner of that property;" next "if you have any money of mine you are to acknowledge him as the owner of it." This gives the son a right to dispose of that property as he may think fit, and it makes him *dominus rerum*, to the full extent that the father himself was. It makes him as much a principal, with respect to Sir John Lubbock, as the father himself was. Suppose the father had said, "I direct you to carry the produce of the *St. Paul Serge* to the account of my son," would not that have been good? But he says, "You are to consider my son as the owner." Well then, suppose the son gives directions as to its application, is not that to be considered good also? There can be no question, that if the father had given such directions, he would have been bound by them; and if the son is placed in exactly the same situation as the father, why is not the father equally bound by the directions given by the son, unless indeed there is some principle of law which forbids it, and there is none that I know of.

It does not rest upon this letter alone, for a fortnight afterwards, on the 27th of *February*, in another letter the father says this, "In my last of the 18th I wrote to you by my son *Judah*, and now I confirm to you, that, any time you may have any money of mine, you may acknowledge my son *Judah* as myself, so that he may place and dispose of my money as if it was his own property, and you will acknowledge him as the owner of the money." That is to say, you will take his directions with respect to any property or money of mine, exactly in the same way as if I myself gave those directions, and I consent to be bound by such a proceeding. It appears to me to be impossible to read these letters in any other way than this. Is it to be contended, that a father cannot give his own son such a power,

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power, or that the nature of the relation between principal and agent is such, that a principal cannot direct his agent to receive directions from another person, exactly in the same manner as if he himself gave them? I am ignorant of any principle of law that prevents it, and it would be new to me to find, that the law of principal and factor forbids a principal to say to his factor "you shall take certain directions from another person, exactly in the same manner as if I myself gave them." No doubt they may be limited to the selling and buying, but if the principal says, "you shall be at liberty to pay any balance to my son for his own advantage, and follow any directions of his upon the subject," I am at a loss to know what principle of law there is which forbids a principal from so dealing with respect to his agent. Then if that be permitted by law, I am unable to find any words by which it can be done more expressly than in this case, "I wish you to consider my son as myself, I wish you to acknowledge him as myself, so that he may dispose of my money as if it was his own property, and that you will acknowledge him to be the owner of the money." It is done with a redundancy and a surplusage of expressions. It is not merely saying, "I wish you to consider my son as myself," but he goes on to say, and "let him dispose of my money and as if it were his own property," and if that were not sufficient, he goes on further and says, "you must acknowledge him to be the owner of the money."

There is a third letter, in which he says:—"Whatever my said son may say for me, is the same as if I said it myself, which must guide you." This letter, if it stood alone, might be open to the observations that it only related to the buying and selling, but the two former letters shew that he made him complete and  
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entire owner of the whole property, to deal with it as he thought fit.

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I have looked at it in another point of view, suppose the son had ordered him to pay a sum of money on his father's account, and Sir *John Lubbock* had refused to do so, and that, in consequence, the father had suffered great injury, an action might have been supported against Sir *John Lubbock* for disobeying the orders of the agent. The matter does not appear to me, in the slightest degree, altered, by the fact that the son was carrying on business on his own account in *London*, or that the son was, in many respects, acting as the agent of the father, or that he had so acted previously in giving directions to Sir *John Lubbock*.

It is clear there was nothing to authorize Sir *John Lubbock* to place any sums arising from the father to the account of the son, unless the son directed it, and the next question therefore is, did the son give him any authority with respect to the proceeds of the "*St. Paul Serge*?" In my opinion, it was not necessary that the authority should be in writing, it might be verbal, and I am of opinion that such authority was given to Sir *John Lubbock* by the son; and no complaint was made upon the subject until after the bankruptcy of the son, when the interests of the parties were completely altered.

The result is, that I must hold, that the proceeds of the cargo of the "*St. Paul Serge*" were properly put to the account of the son. The short way in which I put it is this:—the letters appear to me to give the son power to deal with all the cargoes and the money arising from them as his own property, exactly in the same manner as the father could; that the son directed the sum in question



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tion to be placed to the credit of his account, and which, if the father had done it, would have been binding; and the son having the same power as the father, and having acted upon that power, the father is equally bound; and there is no rule of law which forbids such a course of dealing.

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NOTE.—Affirmed by the Lords Justices, *January 15, 1856.*

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May 24.

July 7, 11.

FRY v. NOBLE.

Dower of a woman, married after the Dower Act, out of an estate made subject to dower by that statute, held, not to be excluded by a declaration against dower contained in a conveyance prior to the act.

In 1827, freeholds were conveyed to A. B., a married man, to the usual uses to bar dower, "to the intent that his then

BY indenture of release, dated 8th *August, 1827*, certain real estate was conveyed to the use of such persons as *Thomas W. Fry* (then a married man) should by deed appoint, and in default of appointment to the use of *Thomas W. Fry* for life, and after the determination of that estate by any means in his lifetime, to the use of *John Fitch*, his executors and administrators, during the life of *Thomas W. Fry*, upon trust for *Thomas W. Fry*, "and to the intent that the then *present or any future wife* of the said *Thomas W. Fry* might not be entitled to dower," with remainder to the use of *Thomas W. Fry* in fee.

*Fry's* wife afterwards died, and in *September, 1838*,  
he

present or any future wife might not be entitled to dower." In 1834, the Dower Act passed, giving dower out of estates thus limited (s. 2), but allowing the right to be defeated by a declaration against dower in the conveyance (s. 6), and providing, that the act should not extend to any widow married before 1834, or give to any deed previously executed the effect of defeating any right of dower. A. B. contracted a second marriage in 1838, and died seised. Held, that the declaration in the conveyance did not defeat the second wife's right to dower out of the estate.

Costs allowed to a widow, in a suit for dower, her right thereto being contested.

He intermarried with the Plaintiff. *Fry* died intestate in *October*, 1842, without having exercised the power of appointment contained in the deed of 1827, and seised of the property.

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After *Fry's* death, his heir at law entered into possession of the property. He mortgaged it to *Russell* in fee, with power of sale; and in *May*, 1853, *Russell* sold it to *Noble*, who claimed to hold it discharged of the Plaintiff's dower. The Plaintiff thereupon filed her bill to enforce her right.

The Plaintiff's title depended entirely upon the construction of the 2nd, 6th, and 14th sections of the Dower Act (3 & 4 Will. 4, c. 105), which passed on the 29th of *August*, 1833, after the execution of the deed and before the Plaintiff's marriage. Sect. 2 enacts, "that when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable or partly legal and partly equitable, shall be an estate of inheritance in possession or equal to an estate of inheritance in possession (other than any estate in joint tenancy), then this widow shall be entitled in equity to dower out of the same land." By sect. 6, "a widow shall not be entitled to dower out of any land of her husband when, in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared, that his widow shall not be entitled to dower out of such land." Sect. 14 enacts, "that this Act shall not extend to the dower of any widow who shall have been or shall be married on or before the 1st of *January*, 1834, and shall not give to any will, deed, contract, engagement or charge executed, entered into or created before the said

1st



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1st of *January*, 1834, the effect of defeating or prejudicing any right to dower."

Mr. *Follett* and Mr. *Wickens* for the Plaintiff. It is not disputed that the Plaintiff has no right to dower by the old law, and independently of the Dower Act; but the 2nd sect. prevents the common uses to bar dower from depriving a widow who married subsequent to the Act of her dower. The 3rd sect. makes seisin unnecessary to give title to the widow, and the Act proceeds, in the 6th sect., to point out the mode by which the widow's title to dower may be defeated either wholly or partly by the declaration of the husband. It will be contended, that such a declaration contained in a deed executed anterior to the 1st of *January*, 1834, will have the same effect as if executed since the passing of the Act, and will deprive the widow of dower; but that cannot be the proper construction of the clause, which is prospective only and not retrospective. This is clear from the language of the clause itself, for the words are when by the conveyance "it shall be declared," not "shall have been" declared. The section is therefore applicable to future declarations only, that is, declarations made after the passing of the Act.

But the 14th sect. is that upon which the Plaintiff relies, as shewing conclusively, that the Act cannot be so construed as to deprive her of dower by any such declaration as that relied upon. That section distinctly enacts, that the Act shall not give to any "deed executed before the 1st of *January*, 1834, the effect of *defeating or prejudicing any right to dower.*" The declaration contained in the deed of *August*, 1827, cannot therefore have the effect of defeating the Plaintiff's right to dower. It is clear that the common limitations to uses to bar dower would not alone deprive the Plaintiff

tiff of her dower, and a declaration alone before the Act would not have done so. The widow is, therefore, entitled to her dower.

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Mr. R. Palmer and Mr. T. Stevens, *contrâ*. The plain object of the legislature was to leave existing rights unaffected, but to alter the rights to dower of those women who might marry after the 1st of *January*, 1834: to put these on a new footing, but to leave the rights of those already married untouched. Down to the 14th sect. the enactments are general, and would apply to every widow, and the 14th sect. first introduces a restriction to its operation. It enacts, that that Act shall not extend to the dower of any widow married on or before the 1st of *January*, 1834, and proceeds to say, that it shall not give to any deed, &c., executed before that period, the effect of defeating any right to dower. The second part of the clause is ancillary to the former part, and is applicable only to such right of dower as a widow married before that period might have been entitled to under the old law, and not to any new right of dower introduced by that Act. Any widow taking the benefit of the Act, and insisting on her right to dower under its provisions, must take subject to all the qualifications attached in its very creation to the new species of dower, and amongst them, subject to the right of the husband to prevent her dower attaching to an equitable estate by a simple declaration to the contrary.

The limitation of the estate to uses to bar dower would defeat the dower under the old law, and the declaration against dower would prevent its attaching under the new; so that, in both ways, the Plaintiff's right is barred.

Mr. Follett, in reply. The 2nd sect. must be read together

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together with the 6th, the latter being, in fact, an exception out of the former, and to give the latter an exclusively prospective operation would lead to great absurdities and contradictions. The two sections taken together give dower to widows out of their husbands' lands, in all cases thereafter generally, except where it is declared that they are not to have it.

*The MASTER of the ROLLS* reserved judgment.

July 7.

*The MASTER of the ROLLS.*

The question is, whether the Plaintiff is entitled to dower out of the real estate of her husband, and depends on the construction of the Dower Act.

Two things are quite clear, first, that if the words, "to the intent that the then present or any future wife of *Thomas W. Fry* might not be entitled to dower" had been omitted from the deed of 1827, the Plaintiff would have been entitled to dower: and next, that if the deed with these words had been executed since the Dower Act, the widow would have been barred.

The clauses which affect this question are the 2nd, the 6th and 14th. The 2nd and 14th are relied on by the widow, and the 6th is relied on by the heir at law. Now, if the 2nd clause stood alone, the wife's right to dower would have been clear, for here the husband died beneficially entitled to land, for an estate equal to an estate of inheritance in possession, under the ordinary limitations to bar dower. By the 6th sect. it is enacted, that the widow shall not be entitled to dower where the conveyance declares she shall not, and on reference to this conveyance, it settles the matter against the widow  
because,

because it contains this express declaration, "that the then present or any future wife of *Thomas W. Fry* shall not be entitled to dower" out of such lands. It is contended, however, that these words in the 6th sect. are prospective and relate only to deeds which are to be executed after the passing of this Act. The words of the clause are ambiguous, it says, "when in the deed by which such land was conveyed to him," (that does not appear to be prospective, but to relate to every species of deed,) "or by any deed executed by him," (that may mean which has been, or hereafter may be, executed by him,) "it shall be declared" (that is, that the deed shall declare). I do not think it absolutely necessary to determine whether this clause is prospective or not, in the view I take of this case; but it is clear that by itself it might be applied to existing deeds as well as to deeds thereafter to be executed.

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It was also argued, that, as the 2nd clause was retrospective, it is reasonable enough that this clause should also be retrospective; because, though it affects only the case of widows who were married subsequently to the passing of the Act, yet it affects deeds conveying property to husbands who have married these women subsequently to the passing of the Act, and therefore has a retrospective effect on those deeds.

The effect of this clause cannot be fully understood without reading the 14th sect., which is the section on the construction of which this case principally turns. The 14th sect. is by no means expressed with clearness; and the argument against the widow is, that the whole intention of the 14th sect. cannot be to give to a widow a right to dower not previously existing, and that the effect of the clause in the statute must be taken to be, in a broad common sense view, to leave the existing  
rights

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rights as they were without ; and that the construction suggested of giving the 6th sect. an exclusively prospective operation would lead to absurdities and contradictions.

The result of the consideration which I have given to the statute leads me to the conclusion, that, in the present case, the widow is entitled to dower. The 2nd sect. standing alone clearly gives it, and I do not find anything subsequent to cut it down.

If the deed in this case had omitted the declaration against dower, it is obvious that the statute would have had a retrospective effect upon it, and would have given the wife a right to her dower. The addition of this declaration, in fact, adds nothing to the deed itself ; for if the deed had contained that declaration alone without any sufficient limitation to uses to bar dower, it is obvious that the dower would have attached totally independent of the Act, and that the 14th sect. would have prevented the 6th sect. from applying so as to deprive the widow of her dower, to which, but for the Act, she would have been entitled. The statute, therefore, appears to me to be very much to this effect :—The 2nd sect. gives the dower to the wife in every case where the husband of a wife married subsequently to the 1st of *January*, 1834, has an estate equal to an estate of inheritance. Then the 6th sect. says, that the wife's dower is to be taken away whenever there shall be in the conveyance of the land a declaration that she shall not be entitled to dower. This section leaving it doubtful whether the declaration is to be prospective only, or prospective and retrospective also, the 14th sect. says, "but this Act shall not give to any deed executed before the 1st of *January*, 1834, the effect of defeating or prejudicing any right to dower."

I read

I read the enactments very much as if they were three Acts of Parliament instead of three clauses. The 1st gives the dower, the 2nd takes it away, but the 3rd says, that a prior deed is to have no operation at all in defeating dower. Independently of the 6th sect., she appears to me to be entitled to her dower, and I am of opinion that the 14th sect. prevents the 6th sect., or the declaration in the deed, from having any operation or effect.

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FAR

v.

NORRIS.

Although I was a member of the legislature at the time this act passed, and took some part in the discussion of the real property statutes which then passed, I am unable to state what motive the legislature had in providing that the ordinary uses to bar dower, which expressed an intention that dower should not attach, should for the future have no operation, and yet allowing a simple declaration, in another form of words, to have that effect. It is somewhat difficult to understand, where the intention is clear, why the legislature should have preferred one mode of expressing that intention to another. It appears somewhat capricious, but I can only construe the Act as I find it. It seems to be pretty clear that the real property commissioners, from whom this statute originated, seem to have had an intention of putting an end to dower altogether; but they found this either difficult or impossible, and instead of doing so suggested this modification of it.

However, the result of my opinion on this case, which I presume was never contemplated by the framers of this Act, is, that the widow is entitled to her dower.

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Mr. *Follett* asked for the costs of the suit, contending that the Plaintiff was entitled to them, because the question



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question raised was a question of right to dower; and that there was no such thing as a legal remedy for dower under this Act of Parliament.

Mr. *R. Palmer* and Mr. *Stevens*, *contra*. Under the old practice, in suits for dower, each party bears his own costs (*a*), unless where a vexatious defence is set up; *Bamford v. Bamford* (*b*). The right is just as much legal here as it was before.

*The MASTER of the ROLLS.*

The estate was in this case conveyed to uses to bar dower. It is a legal estate, in fact the dower was not barred by creating a trust estate, but, by conveying it to uses to bar dower it is a legal estate. Still I should wish the practice to be looked into.

July 11.

*The MASTER of the ROLLS.*

I have looked into this matter, and I am of opinion that this is a case in which the costs ought to be allowed to the Plaintiff. This is not, in fact, one of the cases in which, upon an undisputed question, the Plaintiff comes merely for the purpose of having partition, or the dowable lands set out by metes and bounds; but it is, in truth, a disputed right to the dower, resisted upon grounds which failed, though I admit the question was one of considerable nicety, and justified the Defendant in contesting the Plaintiff's right. But I repeat the observation which Lord *Cottenham* frequently made, that

(*a*) *Beames on Costs*, 35, 36.

(*b*) 5 *Hare*, 203.

which Lord *Cottenham* frequently made, that the mere fact of a case being one of difficulty, (unless the difficulty is created by a testator, and his estate can be made to pay for it,) is not a sufficient ground for saying, that the person who is in the right shall not recover what he claims, together with the costs to which he has been subjected in obtaining it.

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I must, however, say, that the conduct of the Defendant appears to me to have been as proper as it was possible to be, and I have no sort of objection to make, either to the correspondence or to the course which he has taken. However, viewing the case in the most favourable manner for the Defendant, still I am of opinion that the Plaintiff is entitled to her costs.

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NOTE.—Affirmed by the Lords Justices, December 11, 1855; Lord Justice *Turner*, *dubitante*.

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### SPORLE v. WHAYMAN.

IN August, 1854, the Plaintiff, *Sporle*, signed a joint and several promissory note for payment, on demand, to a benefit society of 160*l.*, and of interest monthly.

July 20, 23.

Title deeds were deposited by the Defendant with the Plaintiff as an indemnity against contingent payments, but there was no agreement to execute a formal mortgage. Before the deeds Plaintiff had made any pay-

This sum was borrowed for the benefit of *Whayman* and another, and *Sporle* was a mere surety. To indemnify *Sporle*, *Whayman* deposited with him the title deeds of his copyhold estate. There was no written memorandum of deposit, and the precise terms on which the

deeds Plaintiff had made any payment, he filed a bill to have a formal mortgage executed. Held, that he was not entitled thereto, but only to a memorandum, signed by the Defendant, specifying the terms of the deposit.

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 v.  
 WHAYMAN.

deeds were deposited were disputed ; but, on the conflicting evidence, the Court came to the conclusion, that the Defendant had entered into no obligation to execute any formal mortgage, until the Plaintiff should be called on to pay the money for which he had become surety.

Instalments of the principal sum borrowed were, according to the regulations of the benefit society, payable monthly, and such instalments and the interest were regularly paid, and the Plaintiff had not, as yet, been called on to pay anything. Notwithstanding this, however, the Plaintiff insisted on the Defendant's executing a formal legal mortgage of the copyholds. The Defendant neglected to do so, and the Plaintiff thereupon filed this bill, praying a specific performance, by the Defendant, of the alleged agreement between him and the Plaintiff, to execute a mortgage of the copyhold hereditaments, with all proper covenants and provisions for the Plaintiff's indemnity, pursuant (as the Plaintiff alleged) to the agreement, and to do all things necessary and proper for the purpose of giving the Plaintiff a valid and effectual mortgage.

Mr. *Eddis*, for the Plaintiff.

Mr. *Roupell* and Mr. *Hardy*, for the Defendant.

*The MASTER of the ROLLS* reserved judgment.

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July 23.     *The MASTER of the ROLLS.*

After reading the affidavits, I think that the Plaintiff has asked for more than he is entitled to, and that the Defendant has refused that which he is bound to give.

The

The state of the case is this :—*Whayman* and another person, wanting to borrow a sum of money from a benefit society, induced the Plaintiff and another to give a joint and several promissory note to the secretary of the society to secure the repayment of the money. The mode of paying off the debt was this :—They were to pay a sum for interest every month, and in addition, they were to pay monthly instalments for six years, until the principal and interest had been fully paid off. The Plaintiff, though he received no part of the money, consented to sign this joint and several promissory note, provided he should be indemnified by having a deposit of the title deeds of some copyholds to secure him. [*His Honor here examined the conflicting testimony as to the terms on which they were to be deposited, and proceeded.*]

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The result seems to be this :—There was an agreement that the title deeds of the copyholds should be an indemnity against anything the Plaintiff should be called on to pay ; but I am satisfied, from the affidavits, that there was no intention that a formal deed should be executed ; the effect of which would be to put the Defendant to a great expense ; this he never contemplated, but merely that the deeds should be simply deposited.

The Plaintiff wants to preserve evidence of the terms of the deposit ; I think he is entitled to have it in writing, in order to make it effectual, if he should ever be called on to pay the promissory note. His right is clear, for suppose, after the lapse of four or five years, the Plaintiff should be called on to pay any part of the debt, if the Defendant were dead, the terms of the agreement might then be contested. This Court daily sees the great inconvenience which arises from depositing deeds without clear written evidence of what it is to secure.

1855.

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WHAYMAN.

Thinking that the Plaintiff is entitled to have evidence in writing, I have then specifically to perform the agreement, and I am of opinion, that the Plaintiff is entitled to receive a memorandum signed by the Defendant, specifying the terms on which the title deeds were deposited. I shall direct him to sign such memorandum, and the terms of it must be settled in Chambers if the parties disagree.

I give no costs.

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ROLFE v. CHESTER.

July 25, 31.

Since the 3 & 4 Will. 4, c. 104, a mortgagee of copyholds may tack a simple contract debt to his mortgage debt, as against the customary heir or devisee, but not as against specialty creditors. It seems also that a mortgagee may tack a simple contract debt to his mortgage debt as against the heir, devisee or executor, wherever the equity of redemption is assets in their hands for payment of simple contract debts.

**G**EORGE RUTTER, in June, 1848, mortgaged certain copyhold or customary hereditaments to *Ann Ives*, to secure the sum of 150*l.*, with a power of sale. By his will, dated in November, 1850, *Rutter* devised the hereditaments, subject to his funeral expenses, to the Plaintiff, *Jane Rolfe*, for life, and after her decease, to his granddaughter, the Plaintiff *Georgina Maria Rutter*, for life, and after her decease, he directed the whole to be sold and the proceeds divided among his grandchildren. He appointed *Jane Rolfe* and *Joseph Crump* his executors.

The testator died in January, 1853, leaving six grandchildren, who were infants and Plaintiffs in this suit.

In March, 1855, *Ann Ives* transferred the mortgage to the Defendant, *Charles Chester*, without the knowledge of the Plaintiffs, and he was admitted to the property. The Plaintiffs' solicitor, on the 17th of April, tendered

tendered to *Chester* 150*l.*, and 3*l.* interest, but *Chester* refused the tender, unless he was also paid a simple contract debt of 159*l.* 4*s.* 11*d.* due to him from the testator. *Chester* had, by administration summons, filed on the 24th of *June*, 1853, commenced the suit of *Chester v. Rolfe*, in which an order had been made, on the 7th of *July*, 1853, for an account of what was due to him and the other creditors of the testator, and for an account of the testator's personal estate, but no certificate had been made in pursuance of the order.

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This bill, filed by *Jane Rolfe, Joseph Crump* and the six infants, prayed an account of what was due on the mortgage for principal and interest, after deducting the rents and profits received by *Chester*, who was in possession, or which, but for his wilful default, might have been received, and that on payment of what should be found due, the Defendant, *Chester*, might transfer the mortgaged premises to some one in trust for such of the Plaintiffs as should pay the same; and that if anything was to be raised out of the hereditaments for payment of testator's debts, the same might be raised by mortgage, and for an injunction and receiver.

Mr. *R. Palmer* and Mr. *Bush*, for the Plaintiffs, asked for the ordinary decree, and that the interest on the mortgage debt should cease from the date of the refusal to accept the tender.

Mr. *Lloyd* and Mr. *W. G. Collins*, *contrà*, contended that *Chester* had a right to tack his simple contract debt to the mortgage debt. They relied upon *Coleman v. Winch* (a), and cited *Bythewood* by *Jarman* (b).

Mr.

(a) 1 *P. Wms.* 775; *Proc. Ch.* 511. (b) Vol. 5, p. 440, 3rd edit.

## CASES IN CHANCERY.

1. Mr. R. Palmer, in reply, referred to *Uppington v. Bullen* (a), in which Lord St. Leonards said, "That it was extremely questionable whether, even since the statute (3 & 4 Will. 4, c. 104), a party would be permitted to tack a simple contract debt to his mortgage." He also argued, that this case did not come within the reasoning of *Coleman v. Winch*, for, as to copyholders, the 3 & 4 Will. 4, c. 104, made them assets, in equity only, for payment of debts, and rendered the customary heir and devisees liable only to a suit in equity and not to any legal process, and therefore giving to the creditor no legal rights and imposing on the customary heir, &c., no legal obligation. That the right to tack only existed where the person coming to redeem was liable to pay the two debts, and here the devisees were not bound to pay, and the statute made the estate assets, only in case and to the extent of the deficiency of the personal estate.

### *The MASTER of the ROLLS.*

I think that the principle stated by Lord Maclesfield, in *Coleman v. Winch* (b), establishes the right of the mortgagee to tack the simple contract debt. He says, "The bond of the ancestor, wherein the heir is bound, becomes, upon the ancestor's death, the heir's own debt, for which he is suable in the *debet* and *delinet*, and, therefore, if he comes to redeem the mortgage made by his ancestor, he must pay the debt by bond as well as that by mortgage." "Suppose one be indebted to A. by mortgage of a term for years, and also indebted to him by bond, if on the death of the mortgagor, his executor brings a bill to redeem the mortgage, he must pay both." "So if the testator, being possessed of a term, mortgages it to A., and becomes also indebted

(a) 2 Dr. & War. p. 190.

(b) 1 P. Wms. p. 776; Prec. Ch. 30.

indebted to A. by simple contract and dies, his executor, bringing a bill to redeem, shall pay both the mortgage and the debt by simple contract, because the very equity of redemption is assets to pay simple contract debts; but if any creditor of the testator brings a bill to redeem this mortgage, he shall pay only the mortgage."

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That judgment is very comprehensive, and includes all the cases; it in fact decides, that where the heir, devisee or executor files a bill to redeem, the mortgagee is entitled to tack his simple contract debt to the mortgage, whenever the equity of redemption is assets for the payment of simple contract debts. Here the statute expressly makes the copyholds assets for the payment of simple contract debts, exactly in the same manner as if they were assets in the hands of the heir, and as if the debts were by specialty and binding on the heir.

I am of opinion, therefore, that in this case, the Defendant is entitled to tack the simple contract debt to his mortgage debt, and that the ordinary decree to redeem must be made, unless the parties agree upon a sale.

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After some discussion, this cause was ordered to be in the paper to come on with the cause of *Chester v. Rolfe*, on the 31st of *July*, and the Master of the Rolls then expressed an opinion that the Defendant could not tack as against the specialty creditors.

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*July 31.*



1855.



## GIBSON v. SEAGRIM.

June 23, 25.

Two properties, X. and Y., were mortgaged to A., and afterwards X. alone was mortgaged to B. Held, that B. is entitled to have the securities marshalled, so as to throw A.'s mortgage, in the first instance, on estate Y.

IN 1851, *Charles Seagrim* mortgaged certain real estate to *Henry Johnson*, with a power of sale, to secure 1,200*l.* Afterwards, in 1852, *Seagrim* mortgaged the same estate to *Godwin* to secure 700*l.*, and by deed of even date transferred ten shares in the *Winchester Gas Light and Coke Company*, by way of additional security.

In 1853, *Seagrim* mortgaged all his lands, including those in the former mortgage, to the Plaintiff, but the gas shares were not comprised in the security. On the 17th *August*, 1853, the Plaintiffs instituted the present suit to realize their securities, and they registered the suit as a *lis pendens*, in pursuance of the act (a).

On the 10th *October*, 1853, *Seagrim* became bankrupt and his assignees were made parties to the suit.

On the 4th *November*, 1853, the first mortgagees sold the real estate included in their mortgage for 1,895*l.*, and, after paying themselves, they handed over the surplus to *Godwin*, who applied it in part payment of his mortgage debt, and he then, on the 13th *December*, 1853, sold the gas shares, and, having paid himself in full, handed over the balance (being about 206*l.* 10*s.* 1*d.*) to the assignees of *Seagrim*. The Plaintiffs claimed to have this sum applied in satisfaction of their debt, in lieu of the surplus of the proceeds of the real estate intercepted by *Godwin*.

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(a) 2 & 3 *Vict.* c. 11.

The question was adjourned from chambers for argument in Court.

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SEAGRIM.

Mr. *R. Palmer* and Mr. *Giffard*, for the Plaintiff. *Godwin* had two securities, the estate and the gas shares, while the Plaintiff had one only, viz. the estate. The principle of marshalling is therefore applicable, and the Plaintiff is entitled to require that *Godwin* should be paid out of the gas shares alone, so as to exonerate the real estate for the Plaintiff's benefit.

The principle is laid down by Lord *Hardwicke*, in *Lanoy v. The Duke of Athol* (a):—He says, “The Duchess has two funds, real and personal assets, to answer her demands; the Plaintiff has only one. Is it not then the constant equity of this Court, that if a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien. Suppose a person, who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first, the Courts, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons. And, therefore, I am of opinion, that, so far as will secure the Plaintiff her 6,000*l.* fortune, she ought to be considered as a creditor, and entitled to turn the Duchess upon the copyhold and personal estates.”

Lord *Eldon* adopts similar language, in *Aldrich v. Cooper* (b):—“The Court has said, and the principle

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(a) 2 *Atk.* p. 446.(b) 8 *Ves.* p. 391.

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is repeated very distinctly in the *Attorney-General v. Tyndall* (a), that, if a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor, having two funds, shall take to that, which, paying him, will leave another fund for another creditor."

He subsequently, in giving an illustration of the rule, instances this very case:—

He says (b), "Suppose another case:—two estates mortgaged to A.; and one of them mortgaged to B. He has no claim under the deed upon the other estate. It may be so constructed, that he could not affect that estate after the death of the mortgagor. But it is the ordinary case to say, a person having two funds shall not, by his election, disappoint the party having only one fund; and equity, to satisfy both, will throw him who has two funds upon that which can be affected by him only, to the intent that the only fund, to which the other has access, may remain clear to him. This has been carried to a great extent in bankruptcy." In *Baldwin v. Belcher* (c), Sir Edward Sugden states the rule to be perfectly settled. His language is this:—"The rule of law is perfectly settled. If there are two creditors who have taken securities for their respective debts, and the security of first creditor ranges over two funds, while the security of the other is confined to one of those funds, the Court will arrange or marshal the assets, so as to throw the person who has two funds liable to his demand on that which is not liable to the debt of the second creditor." The same rule is adopted in *Averall v. Wade* (d); *Hughes v. Williams* (e). The case

(a) *Amb.* 614.

(b) 8 *Ves.* p. 391.

(c) 3 *Dr. & War.* 176.

(d) *Ll. & Goo. (temp. Sugden)*, 252.

(e) 3 *Mac. & Gor.* p. 690.

case of *Barnes v. Racster* (a) will be cited on the other side, but the Vice-Chancellor *Knight Bruce* expressly states, that his conclusion in that case is "entirely in accordance with the principles on which *Lanoy v. The Duke of Athol*, *Aldrich v. Cooper* and *Averall v. Wade* were decided."

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Mr. C. C. Barber, for the assignees, *contra*. This is a mere foreclosure suit, in which the Plaintiff would have been simply entitled to redeem the prior mortgages and foreclose the mortgagor; it raises no particular equity. The first and second mortgagees have realized their securities, as they were entitled to do, and the surplus of the gas shares has been handed over to the assignees; this was quite proper, for the Plaintiff never had any interest in those shares. The prior mortgages have been discharged, there is now no account to be taken, and the fund is no longer *in medio*, but in the hands of the assignees, and as in the case of by-gone rents received by a mortgagor, no account can now be given. The Plaintiff has no peculiar equity to be paid in preference to the other creditors of the mortgagor, the utmost relief to which he can be entitled is, to order the prior mortgages to be paid *pari passu* out of the two funds, as was done in *Barnes v. Racster* (u). In that case, there were two properties, *Foxhall* and *No. 32*. *Foxhall* alone was mortgaged first to *Barnes*, and then to *Hartwright*. After this, *Foxhall* and *No. 32* were mortgaged first to *Barnes* and then to *Williams*. *Foxhall* being insufficient to pay the first mortgage, but *No. 32* being sufficient to pay both of *Barnes's* mortgages, *Hartwright* insisted, as against *Williams*, that *Barnes* should be paid out of *No. 32* alone, in order to exonerate *Foxhall*, and thus leave

(a) 1 Y. & Coll. C. C. 401.

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leave sufficient to pay *Hartwright's* mortgage ; but the Vice-Chancellor *Knight Bruce* held, that it was not a case for marshalling, and that *Barnes* must be paid *pari passu*, out of *Foxhall* and *No. 32*, and that the residue of *Foxhall* must go to *Hartwright*, and the residue of *No. 32* to *Williams*. The reasoning of the Vice-Chancellor shews, that the mortgagor and *Barnes* together, and the mortgagor alone, as against *Hartwright*, might have made a valid sale or mortgage of *No. 32*.

This reasoning applies to the present case and proves, that the payment over of the residue to the assignees was a valid irrevocable payment.

*Mr. Giffard*, in reply, alluded to *Sober v. Kemp (a)*.

*The MASTER of the ROLLS* reserved judgment.

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June 25. *The MASTER of the ROLLS.*

I am of opinion that the two estates ought to be marshalled. I can have no doubt that if these securities had been sold by the direction of the Court, and the money had been paid into Court, the second mortgagee would not have been allowed to exhaust the proceeds of the real estate in paying off his charge upon it, to the injury of the Plaintiffs, and then to hand over the surplus proceeds of the gas shares to the mortgagor, or to his assignees, which is the same thing, and thereby enable them to receive something to which they were not entitled. On the contrary, accord-

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(a) 6 *Hare*, 155.

ing to the principle laid down in the case of *Baldwin v. Belcher* (a); *Lanoy v. Duke of Athol* (b); *Aldrich v. Cooper* (c), and that class of cases, the Court will order the funds to be marshalled; but I agree with what was decided by the Vice-Chancellor *Knight Bruce*, in *Barnes v. Racster* (d), that if two estates are mortgaged to A., and one is afterwards mortgaged to B., and the remaining estate is afterwards mortgaged to C., B. has no equity to throw the whole of A.'s mortgage on C.'s estate, and so destroy C.'s security. As between B. and C., A. is bound to satisfy himself the principal, interest and costs due to him out of the two estates rateably, according to the respective values of such two estates, and thus to leave the surplus proceeds of each estate to be applied in payment of the respective incumbrances thereon. But, in my opinion, that rule does not apply to the present case, to which a different equity is applicable.

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It is obvious, that there are three modes of dealing with this case, the first is, to allow the Plaintiff to throw the whole of the second mortgagee's charge upon the gas shares, and make them solely available for payment, the second, to apportion the second mortgage rateably on the two properties, as was done in *Barnes v. Racster*, or thirdly, to let the mortgagor have the whole surplus of the produce of the gas shares after satisfying the claim of the second mortgagee. But, in my opinion, neither of these last two principles apply to this case. Here a mortgagor having mortgaged two properties to one person, and one of them to another, and the security of the latter having been exhausted by the prior mortgagee, he is entitled to say, as against the mortgagor,

(a) 3 Dru. &amp; War. 173.

(b) 2 Atk. 444.

(c) 8 Ves. 382.

(d) 1 Y. &amp; Coll. C. C. 401.

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gagor, that his mortgage shall be thrown upon the other security, and that he is entitled to be recouped out of it.

I do not say what would have been the effect, if the sale and payment over of the surplus had taken place before any suit had been instituted, but here, the decree reserves the question, and the suit having been registered as a *lis pendens* before the sale took place, has the effect of preserving all the equities, in the same manner as if the Plaintiff had taken proceedings to have the money paid into Court.

I am of opinion, that the Plaintiff is entitled to have the 206*l.*, which is now in the hands of the assignees, applied in payment of his mortgage security, and that the second incumbrancer was bound, as between the Plaintiff and the mortgagor, to apply the gas shares in the first instance towards the discharge of his debt.

I will certify accordingly.

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NOTE.—See *Tidd v. Lister*, 10 *Hare*, 157.

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1855.

SPYER v. HYATT.

Feb. 20.

April 21.

**R**ICHARD HYATT, a copyholder of the manor of *Bensington*, in the county of *Oxford*, died intestate, leaving a widow, and an infant son, his customary heir.

By Sir John Romilly's Act, freeholds and copyholds of a deceased are now assets for the payment of his debts, and, by the Dower Act, all debts to which the land of a deceased are subject, are "valid and effectual as against the right of his widow, to dower." Held, nevertheless, that the widow's right to dower or freebench has still priority over mere creditors of a deceased.

The Plaintiff, a creditor of the intestate, had obtained the usual order for the administration of the estate. The personal estate of the intestate being insufficient to pay the debts, the Plaintiff applied for an order for the absolute sale of the copyholds, free from the widow's freebench. This raised the question, whether the widow's right to freebench had or had not priority over intestate's debts. The intestate had never been admitted.

Mr. *Sheffield*, for the Plaintiff. The statute (3 & 4 Will. 4, c. 104) makes freehold, customaryhold and copyhold estates assets for the payment of debts on simple contract, as well as on specialty. The 5th section of the next act (the Dower Act, 3 & 4 Will. 4, c. 105) enacts, "That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements, to which his land shall be subject or liable, shall be valid and effectual, as against the right of his widow to dower." The result is, that the first act subjects the copyholds to the intestate's specialty and simple contract debts, and the second act gives them priority over the widow's dower. Copyholds are equally within the mischief sought to be remedied by the Dower Act, and it is

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to be presumed, that the legislature did not intend to exclude them from it. It is true that the Dower Act makes mention of "dower" only, but here the widow's interest is dower by the custom of the manor, and freebench is therefore within the act. The case is analogous to that of escheat, where the lord takes subject to debts. In *Evans v. Brown* (a), a testator died without heirs, seised of freeholds, which he had not charged with his debts, and it was held, as against the lord claiming by escheat, that the freeholds were assets for payment of the testator's debts. Again, in *Beale v. Symonds* (b), a person, who had made a mortgage in fee, died intestate and without heirs, and it was held, that the equity of redemption did not escheat to the Crown, but belonged to the mortgagee, subject to the mortgage debt. Since the alteration of the law as to dower, the widow's interest in the freeholds is subject to her husband's debts, and the same rule prevails in the case of copyholds. The husband could formerly have excluded the wife from freebench by act *inter vivos* (c), and he may do so now by will. Lastly, the widow's right to freebench never arose, because the husband was not admitted, and he was not therefore seised of the copyholds at his death, and he could not, before the 7 Will. 4 & 1 Vict. c. 26 (Wills Act), have devised them; *Wainewright v. Elwell* (d); *Doe d. Hamilton v. Clift* (e). The right of the creditors, therefore, attached immediately on the intestate's death, and while the widow had no interest in the estate.

Mr. *Martindale*, for the widow, was not heard.

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| (a) 5 Beav. 114. | <i>Burrows</i> , 2785. |
| (b) 16 Beav. 406. | (d) 1 Madd. 627. |
| (c) 1 <i>Scriven on Copyholds</i> , 90; | (e) 12 <i>Ad. & Ell.</i> 566. |
| <i>Vaughan d. Atkins v. Atkins</i> , 5 | |

The MASTER of the ROLLS.

1855.

SPYER

v.

HYATT.

I am of opinion that the widow's freebench is not subject to her deceased husband's debts, but that it has priority over them. If the argument on behalf of the Plaintiff were to prevail, it would follow, that where a person, seised of lands out of which his wife is entitled to dower, dies intestate, the creditors could take the whole of the land, and altogether defeat the widow's dower; but they cannot do so. In truth, what is claimed by or comes to the widow was no part of what the intestate was seised of at his death. He died seised of lands subject to the widow's right to dower, and it is only that which became subject to the payment of his debts.

Freebench stands upon the same footing, and is not subject to the husband's debts.

It is difficult here to see whether the widow actually has a right to freebench at all; and the question as to the custom will be best determined upon the widow's application to be admitted. Let the case stand over to allow the widow to apply for admission.

The widow having been admitted, the usual decree was made for the sale of the copyhold estate, subject to her freebench.

April 21.

1855.

FREAM v. DOWLING.

July 24.

A testator gave his real and personal estate to trustees, and directed them to pay the income to his wife for life, and after her death, to sell his real estate, "and out of the money to arise therefrom, in the first place," to pay to A., B. and C. the following sums (specifying them), and upon trust to invest "the remainder of the money to arise from such sale," and stand possessed thereof and of his personal estate, in trust to pay certain annuities, and he gave the residue to the Plaintiff. Held, by the Master of the Rolls, that the bequests to A., B. and C. were payable solely out of the real estate, but the decree was varied by the Lords Justices.

THE testator, by his will dated in 1843, gave and devised to his three trustees (who were also his executors) all his real and personal estate not thereinbefore disposed of, upon trust, to call in all money in the hands of his bankers at the time of his decease, and the debts due to him and not then invested at interest, and thereout, in the first place, to pay his debts and funeral and testamentary expenses, and the charges of proving his will, and retain to themselves 19*l.* 19*s.* each, and invest the residue, and to pay to his wife the dividends thereof, and the rents, dividends and interest of his other real and personal estate and effects during her life, and after her decease, upon trust, absolutely to sell his real estate, "and shall (proceeded the will) out of the money to arise therefrom, in the first place, pay the following sums, viz., to *Mary Learwood* 150*l.*, to *Thomas Clarkstone* 200*l.*, to *William Clarkstone* 200*l.* and to *James Clarkstone* 100*l.*," and a number of other legacies; and he directed his trustees and executors to pay the legacy duty which would be payable in respect of all the said several legacies. And upon further trust, that his said trustees "should lay out and invest the remainder of the money to arise from such sale or sales" at interest, upon government or real security, and should stand possessed thereof and of his said personal estate thereinbefore bequeathed to them, upon trust to pay each of his sisters and sisters-in-law, *Ann Millington*, *Mary Cole* and *Sarah Prosser*, and his brother-in-law, *William White*, an annuity or yearly sum

sum of 40*l.*, free from legacy or other duty, for life. And upon further trust, to pay the Plaintiff, *Mary Fream*, the residue and remainder of the said interest, dividends and proceeds until the decease of the survivor of them, his sisters and brother-in-law, to and for her own use and benefit; and from and after the decease of such survivor of his said sisters and brother-in-law, that his said trustees or trustee for the time being should stand possessed of all the rest, residue and remainder of the produce of his said real and personal estate, in trust for the Plaintiff absolutely. He then declared, that the interest of his nephews and nieces in their "legacies" should become vested immediately upon his decease, notwithstanding the payment was postponed till after the decease of his wife. He then devised his trust estates to his three trustees, "subject to the trusts and equities affecting the same respectively, and to the purposes of my will."

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The testator died in 1848; his wife predeceased him.

The question was, whether the legacies given by the testator's will (which, exclusive of those to the executors, amounted to 4,350*l.*) and the legacy duty thereon, were charged by the testator on his real estate only, or whether, the real estate being insufficient to pay them, the personal estate was properly resorted to by the trustees to make up the deficiency.

The trustees, considering the real and personal estate to have been intended by the testator to constitute a mixed fund for payment of the legacies, paid them all in full, the real estate being only of the value of 2,000*l.*, so that about 2,500*l.* had been paid out of the personal estate.

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Mr. *Lloyd* and Mr. *Bevir*, for the Plaintiff, *Mary Fream*, the residuary legatee. The testator gives the income of the personal estate and the rents and profits of the real estate to his wife for life, but after her death he separates the real estate from the personal estate and creates a series of trusts in respect of the real estate alone. He directs it to be sold and certain specified sums to be paid out of the produce, and the residue to be invested. This amounts to a gift of specific portions of the produce of the real estate, and these sums are payable solely and only out of such proceeds, and the personal estate is exonerated. This view of the case is strongly supported by the authorities. In *Hancox v. Abbey* (a), there was a devise to sell and pay off a mortgage and raise another sum, which the testator gave to his daughter. It was held, that the personal estate, though bequeathed after payment of debts and legacies, was exempted from payment of those two sums. So in *Newbold v. Roadknight* (b), the testator devised a real estate in trust to sell, and pay out of the proceeds a sum of money to one person and the residue of the proceeds to others; it was held, that this was not a gift of legacies with a collateral charge upon the estate, but substantially a gift of the whole estate itself, and that the gift was ademed if the testator sold the estates in his lifetime. In *Dickin v. Edwards* (c), a testator devised his estate to a trustee upon certain uses, and directed him to raise 1,000*l.* by sale of timber, which he bequeathed to the Plaintiff; and, after giving other pecuniary legacies, he bequeathed his residuary personal estate, subject to the payment of his legacies, debts, &c., to certain legatees. It was held, that the 1,000*l.* was not charged upon the personal estate. All the

(a) 11 *Ves.* 179.*Taml.* 492.(b) 1 *Russ. & Myl.* 677 ;(c) 4 *Hare*, 273.

the authorities are there collected, and the principle is there stated, "that where a testator bequeaths a sum of money in such a manner as to shew a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be held to be controlled merely by a direction in the will, that the monies are to be raised in a particular way or out of a particular fund. In *Mann v. Copland (a)*, Sir T. Plumer says, "the legacy may stand though the fund out of which it is directed to be paid does not exist. The legacy is not so specific and so connected with the fund as to fail if there is no such fund, it appearing that there was a fixed, independent, separate, distinct intent to give the legacy; the particular property out of which it was to be paid being a secondary thought." The principle, therefore, is, that where there is a fixed, separate and independent intention, in the testator's mind, to give the legacy at all events, there the personal estate will go to satisfy the bequest, if the particular estate out of which it is to be paid fails; but here there is no such intention manifested. The legacies are strictly portions of the proceeds of the real estate and nothing more. They cited *Crowder v. Clowes (b)*.

Mr. R. Palmer and Mr. T. H. Terrell, *contrà*. The legacies are general and demonstrative, and do not fail by the failure or inadequacy of the fund; *Fowler v. Willoughby (c)*; *Kirby v. Potter (d)*. In *Savile v. Blacket (e)*, the Court said, "If a legacy was given to J. S. to be paid out of such a particular debt, and there should not appear to be any such debt, or the fund fail, still the legacy ought to be paid, and the failing of the  
*modus*

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(a) 2 Mudd. p. 226.

(b) 2 Ves. jun. 449.

(c) 2 Sim. &amp; Stu. 354.

(d) 4 Ves 748.

(e) 1 P. Wms. p. 779.

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*modus* appointed for payment should not defeat the legacy itself." There is a blending together of the real and personal estate into one fund, which shews that they were both to be liable in the hands of the trustees for the payment of the legacies. The ultimate gift is of "rest, residue and remainder of the produce of the real and personal estate," which form of residuary gift has been held to make legacies a charge both on the real and personal estate, as in *Bench v. Biles* (a); *Mirehouse v. Scaife* (b); *Francis v. Clemow* (c); *Awbrey v. Middleton* (d). They relied on the expression "first place," which intimated that another fund, viz., the personal estate, was to be applied "in the next place," on the direction to the executors to pay the legacy duty, on the proviso which followed the gift to the Plaintiff, where the term *legacies* was used, and on certain pecuniary legacies which the testator had given by his codicil.

Mr. *Lloyd* was stopped in his reply.

*The MASTER of the ROLLS.*

I am of opinion, that the personal estate is exonerated.

There is a distinction of very considerable importance to be found in the books between a legacy given charged upon a particular estate and where the proceeds of the sale of a particular estate are created a fund for the payment of a legacy. In this will I find no gift at all, except out of the proceeds of the sale of the real estate.

The scope of the will undoubtedly is this:—The  
 testator

(a) 4 *Madd.* 187.

(b) 2 *Myl. & Cr.* 706.

(c) *Kay*, 435.

(d) 4 *Vin. Abr.* 460, pl. 15;

2 *Eq. Ca. Ab.* 497, pl. 16.

testator gives to his trustees and executors all his real and personal estate, he keeps the real estate unconverted during the life of the widow, and desires that she should receive the rents of the estate, so that the whole, no doubt, is blended together in one general fund; but upon the death of the widow, he makes a clear and distinct separation. The trustees are then to sell the real estate, and, in the first place, to stand possessed of the money to arise therefrom, upon certain trusts. What are those trusts? Why, it is to be applied, in the first place, in payment of a series of legacies, and then of the legacy duty; and after all this is done, the trustees are to "lay out and invest the remainder of the money to arise from such sale or sales." There is, therefore, a clear direction how the produce of the real estate is to be applied, viz., in the first place, in payment of these legacies, then in the next place in payment of the legacy duty, for though nothing is said in the will that the legacy duty is to be paid out of the proceeds of the sale of his real estate, yet it is clear, from the position in which the direction is placed, that, if necessary, it must fall on it. If legacies are payable out of the proceeds of real estate only, and nothing is said as to the legacy duty, then it is clear that it would have to be borne by the legatees out of the proceeds of the real estate; but here the testator wishes the legatees to take free from legacy duty, and it is payable out of the real estate. I find no other part of the will where there is a direction for payment of the legacy duty. The testator then directs, that the remainder to be invested by the trustees.

It is true he previously blends the real and personal estate, and he subsequently directs the executors to unite the remainder of the money to arise from the sale  
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of his real estate and his personal estate into one fund. Then why did he not direct these legacies to be paid out of the joint fund, if he had intended it, as he did all the subsequent annuities? The case of *Hancox v. Abbey* (a), and all the other cases of that class, appear to me to apply expressly to this case. There is no gift whatever, except after the estate has been converted and the proceeds are in the hands of trustees, who are then directed to apply them in a particular manner.

*Fowler v. Willoughby* (b) was the case of "a pecuniary legacy with a particular security," and the Court gave effect to it, though the particular security intended by the testator happened to fail. It would be a very different thing if the testator had directed a sale of the real estate, and the proceeds apportioned among the various persons; that is the distinction between this case and *Fowler v. Willoughby*, and brings it within the principle laid down in *Hancox v. Abbey*, and other cases of a similar description. The gift of the residue, and the cases relating to that point, as *Mirehouse v. Scaif*, do not appear to affect this question, provided I am right in this:—that there is no gift whatever, except of the purchase-money to arise by the sale of the estates. It is true, that the sale was postponed for the convenience of the life estate, and that the gifts were, nevertheless, to be vested, but that leaves untouched the question, whether the personal estate is exonerated.

If the codicil stood alone, and gave a legacy of 100*l.* to the son of his sister-in-law, *Mary Cole*, and a legacy of 250*l.* to *Rachel White*, the daughter of his brother-in-law, no doubt those would be general and pecuniary legacies, but the testator confirms his will in every respect,

with

(a) 11 Ves. 179.

(b) 2 Sim. & Stu. p. 358.

with the exceptions, that he substitutes a legacy of 100*l.* for 150*l.* to *Charles Cole*, and 250*l.* for 200*l.* to *Rachel White*. The result of which is, that you must read the will as giving those two sums of 100*l.* and 250*l.*, the codicil only altering those two amounts, and leaving all the other matters in exactly the same situation.

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My opinion, therefore, is, that these legacies were thrown upon the proceeds of the real estate, and that the general personal estate was exonerated. The testator expected that the proceeds of the real estate would be sufficient to pay the whole, but why he should have blended the whole funds for one purpose, and then have separated them, and afterwards united them together for another purpose, I cannot speculate upon.

It is a hard case, and very probably all parties acted under a mistake; but there is nothing to amount to acquiescence on the part of the Plaintiff.

Declare the legacies payable exclusively out of the produce of the real estate.

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On the 23rd *December*, 1855, the Lords Justices varied the decree of the Master of the Rolls, by omitting the declaration appealed from, and substituting a declaration that the legacies were all payable out of the proceeds of the real estate and the general personal estate not specifically bequeathed.

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## MILLS v. DREWITT.

July 18, 19.

The testator directed the investment in the funds of sufficient to produce 40*l.* a year, and the dividends to be paid to his wife for life, and he bequeathed his general residue and the fund invested (after her death) to other persons. An investment was made in Five per Cents., which were reduced and produced less than 40*l.* Held, that the widow was entitled to have the deficiency made good out of the *corpus* of the fund.

The widow had received less than 40*l.* for thirty-three years. Held, that there had been no laches or acquiescence, the question now relating to the respective rights of parties to an existing trust fund.

THE testator, by his will, bequeathed his personal estate to his two executors, "upon trust, in the first place, to lay out and invest so much and such part thereof in their joint names, in the purchase of stock in some or one of the public funds, or upon other government or real securities, at interest, in *England*, as by the dividends, interest and annual proceeds thereof would be sufficient to produce the clear yearly sum of 40*l.*, free and clear of property tax and all other deductions whatsoever, and should pay, apply and dispose of the dividends, &c. of the said stocks, &c., as the same should from time to time arise and be received by them or him, unto his wife *Sarah*," for life. And as to all the rest, residue and remainder of his personal estate, and the said stocks, &c., so to be purchased from and after the decease of his wife, in trust to divide the same among five persons therein mentioned.

The testator died in 1813, and the trustees and executors purchased 800*l.* Navy 5*l.* per Cent., which produced 40*l.* a year, for the widow.

In 1822, the 800*l.* Navy 5*l.* per Cents. were, by Act of Parliament, converted into 840*l.* New 4*l.* per Cents., and by successive conversions, they ultimately became 860*l.* New 3*l.* per Cents., the income of which was only 25*l.* 4*s.* a year. After 1822, the income being insufficient to satisfy the annuity of 40*l.*, it fell considerably into arrear.

The

The widow died in 1853, and the Plaintiff was her legal personal representative.

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The Defendant *Drewitt* and two other persons, who, after the death of the executors, had, in 1844, taken upon themselves the trusts of the stock, and had transferred it into their own names, sold out the stock and divided the proceeds among the residuary legatees, though notice had been served upon *Drewitt* by the Plaintiff, that he claimed to have the arrears of the annuity made good out of the *corpus* of the 860*l.* £3 per Cents.

The Plaintiff filed his bill, asking a declaration that the widow was entitled to a full and clear annuity of 40*l.* a year, and to have the arrears made good out of the fund.

Mr. *Lloyd* and Mr. *Cory*, for the Plaintiff, contended, that he was entitled to have the arrears raised and paid out of the *corpus* of the fund, for the gift was not of the interest of so much stock, but a clear annuity of 40*l.*, to be provided for by investing a sum of money sufficient to produce it. They cited *Davies v. Wat-tier* (a); *May v. Bennett* (b); *Kendall v. Russell* (c); *Phillipo v. Munnings* (d); *Roch v. Callen* (e).

Mr. *R. Palmer* and Mr. *Selwyn*, for *Drewitt*, the trustee. The testator did not give his wife an annuity of 40*l.* a year, but only directed the executors to invest a sum sufficient to produce that amount; they strictly complied with that direction, and consequently no more could be required of them, and the widow must, there-fore,

(a) 1 *Sim. & Stu.* 463.

(b) 1 *Russ.* 370.

(c) 3 *Sim.* 424.

(d) 2 *Myl. & Cr.* 309.

(e) 6 *Hare*, 531.

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fore, bear the subsequent variation in the fund effected by an act of the legislature. The case is distinguishable from *Aspland v. Watte* (a), in which no investment at all had been made. The Plaintiff, at the utmost, can only call upon the residuary legatees, as in *Innes v. Mitchell* (b), to abate rateably with the widow in the proportion of the amounts of their respective interests in the investment. The fund required to fulfil the intention of the testator being set apart, the residuary legatees, in case of a conversion of the stock and reduction of dividends, could not alone be called on to abate. The testator carefully avoids using the word "annuity," but adopts the expressions "dividends, interest, &c. of, &c.," and therefore the cases as to an absolute gift of a particular annual sum are inapplicable. What is the sum which ought to have been set apart? the Plaintiff says, a sum which, at all times, would produce 40*l*. But that being once done, what are the rights of the parties to the sum so set apart? The widow was only to have a life estate in it, with remainder to the legatees.

After acquiescing for so long a time in the payment of the reduced amount, the widow was precluded claiming more; *Browne v. Cross* (c). She must be held to have known of the conversion and reduction of the funds by the law of the land; this was laid down by Lord *Cottenham* in *Johnson v. Miller* (referred to by Mr. *Munro*, Registrar).

Mr. *H. Stevens*, for the co-trustees and some of the *cestuis que trust*. The fund is ultimately to be divided amongst the remaindermen, but if the arrears of the annuity are charged upon the *corpus*, the gift to them will be

(a) *Ante*, p. 474.(b) 1 *Phill*. 710.(c) 14 *Beav*. 105.

be defeated, and in effect be struck out of the will;  
*Foster v. Smith (a).*

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Mr. *Roupell* and Mr. *Shebbeare*, for persons entitled to one-tenth of the residue, contended, that this was not a case of improper, but of insufficient investment, in which the widow had acquiesced since 1822, she never having raised the claim now raised by her representative.

Mr. *Lloyd* was not heard in reply.

*The MASTER of the ROLLS.*

I think the Plaintiff is entitled to a decree in this case. I proceed upon the construction of the will, which I am of opinion makes the *corpus* of the fund liable to pay a clear yearly sum of 40*l.* per annum. I apprehend there is no magic in the word "annuity," and that it is not by reason of a person using the word "annuity," and charging it upon an estate, that the *corpus* of the estate is liable to make good that annuity, for it is clear that the testator may use other words exactly in the same manner as he would "annuity." The distinction was taken by Sir *James Wigram* in the *Attorney-General v. Poulden (b)*; but the case here is perfectly distinct from that. If the testator had directed a sum of 840*l.* to be invested in Navy 5*l.* per Cents., and the interest paid to this lady for her life, and had disposed of that fund, after her death, amongst other persons, no reduction whatever by Act of Parliament in the rate of interest payable would have enabled her to come upon the *corpus* of the fund; she would then have

(a) 1 *Phill.* 629, reversing (b) 3 *Hare.* 555.  
*S. C.* 2 *Y. & C. C. C.* 193.

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have been compelled to submit to such abatement, like any other person to whom a fund had been given for life. But here the words are these, "upon trust," &c. [*His Honor here repeated the terms of the gift.*] The object of that is to produce a clear yearly sum of 40*l.*, to be paid to the wife. If the direction had been "to invest such sum in any of the funds as they should in their discretion think necessary to produce it, and then to pay the dividends of that stock for her life, with remainder to other persons, some question might possibly have arisen; but here, the sole purpose and object is, to produce a clear yearly sum of 40*l.*, to be paid to her during her life.

I cannot distinguish this case from the case of *May v. Bennett* (a); it appears to me to be perfectly the same. The word "annuity" was not used in the case of *May v. Bennett* any more than it is here. The case there was this:—The testator, after all his just and lawful debts were discharged, ordered his executors to lay out, in their own names and in what government security they pleased, as much money arising from his estate as would produce the annual interest of 54*l.* 12*s.* per year, for the use of his widow during her life, if she did not marry. It is as near as it can be to this case. Here it is,—to lay out "in some or one of the public funds, or upon other government or real securities," so much as will be sufficient to produce the clear yearly sum of 40*l.*, with a direction to pay the dividends to his wife during her life. In *May v. Bennett*, the testator also directed, if his widow did marry, then the 54*l.* 12*s.* per annum should cease to be paid to her; and he ordered his executors to sell out so much of the said stock in trust as would produce 300*l.*, and to pay it to his

(a) 1 *Russell*, 370.

his wife on her marriage, and the remainder of the stock that was put into trust for the produce of the 54*l.* 12*s.* a year was to become a part of the residue of his estate, in like manner as if she did not marry. The *Master of the Rolls* upon that held, that it gave her a charge upon the fund to have the full amount of that annual sum of 54*l.* 12*s.* paid out of the capital of the fund. I am not, at this moment, considering the question whether she was entitled to have that amount made good out of the residue, but out of the capital of that fund. I am of opinion that this case is exactly analogous and similar to that.

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The case of *Foster v. Smith* (a), was a very distinct case : there the testator gave a particular estate to trustees and directed them to receive the rents, and out of the rents to pay an annuity to the widow of so much per annum. The Vice-Chancellor *Knight Bruce* thought that was a charge upon the *corpus* of the estate ; but the Lord Chancellor, upon the construction of the will, thought otherwise (b), for there a particular and express estate was given to trustees, out of the rents alone of which they were to pay the annuity. That is exactly analogous to the case of the *Attorney-General v. Poulton* (c).

I am of opinion, therefore, upon the true construction of this will, that this fund was made available for the payment of this yearly sum to the widow as long as she lived.

I do not express any opinion, whether this investment was proper or improper : that may raise a question

(a) 2 *Y. & C. C. C.* 193.  
 (b) 1 *Phill.* 629.

(c) 3 *Hare*, 555.



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tion between other persons. All that I have here to do with is the right of the widow, and, in my opinion, she was entitled to have the deficiency made good out of the *corpus* of the fund.

As to the question of laches, or lapse of time, I think it does not apply to a case of this description. Lapse of time and acquiescence apply to cases where a fund is parted with or becomes deficient, and where you seek to make a trustee answerable or liable to pay something by reason of his conduct. Suppose, in this case, the money had been invested in consols, and the trustees had sold out a portion of those consols, by reason of which the amount to pay the widow became insufficient, and that the widow had known of that fact and had acquiesced in it during her life, and received the deficient amount, the question of acquiescence would then have arisen, and it might then have been said, that she could not be entitled now to complain of that which, in point of fact, she had sanctioned, either expressly or tacitly, during her life. But, if I am right in the view I take of this case, this fund, or a part of this fund, is the property of the widow; in fact, a portion of the capital ought to have been paid to the widow during her life, and it is now hers, though she did not claim it during her life. The question now is, how this fund (which I treat exactly in the same manner as if it were now in Court) is to be divided amongst the persons entitled, and whether the persons in remainder are entitled to the whole fund, or whether some portion does not belong to the widow, by reason of her not having been paid her 40*l.* a year in full. I am of opinion, that a portion of this fund does belong to the widow, and that, consequently, her representative is entitled to have the capital applied in making good that which was not paid to her during her life.

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HOOPER v. COOKE.

July 14, 25.

August 2.

IN 1778, by lease and release, a piece of land was conveyed to *J. P.* in fee, to the use that *Peter Hooper* the elder, his heirs and assigns, should for ever receive a rent-charge of 4*l.* to be issuing thereout, and to the use that, when in arrear fifteen days, *Peter Hooper* and his heirs might enter and distrain, and to the use, when in arrear thirty days, *Peter Hooper* and his heirs might enter, and the rents, issues and profits thereof, and of every part thereof, to have, receive and take to and for his and their own use and benefit, until he and they should thereby, therewith or otherwise be fully paid and satisfied, and the said yearly rent-charge and all arrears thereof, and also all such arrears thereof as should grow due during the time he or they should, by virtue of such entry, be in possession of the said premises, or any part thereof, together with all such costs, charges and expenses as should be laid out, sustained or occasioned by or by reason of the non-payment thereof, and subject to the said yearly rent-charge, and to the remedies and powers for the recovery," the property was conveyed, as to one-half, to *Fisher* in fee, and as to the other to *Jelly* in fee. And *Fisher* and *Jelly* covenanted to pay the rent-charge.

A rent-charge was secured on a house, with power, when in arrear, to enter and receive the rents until all arrears and all costs, charges and expenses occasioned by non-payment should be satisfied. The rent-charge being in arrear, the grantee entered, and the house being greatly dilapidated and untenanted, he repaired and let it. Held, that the question whether the grantee of the rent-charge was entitled to be allowed the monies expended by him in repairing the property was one to be determined at law, and that if he was not entitled thereto at law, neither was he in equity.

The property was afterwards conveyed (subject to the rent-charge of 4*l.*) to certain parties, and subject to a further perpetual rent-charge of 40*l.* a year, which

rent-charge

Plaintiff relieved from a judgment at law by consent, given as the price of an injunction in equity, the point in issue turning out to be legal and not equitable.

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rent-charge of 40*l.* was now vested in the Defendant *Cooke*.

In 1842, the houses on the property became very dilapidated, and being untenanted and abandoned became dismantled and the resort of thieves, and the rent-charge of 4*l.* fell four years into arrear. In 1844, the Plaintiff took possession and repaired the houses, at an expense of 532*l.* He let the property and received rents to the amount of 396*l.*, but, in consequence of the damp situation of the property, he expended, out of the sums received, 217*l.* on account of repairs, in order to keep the messuages in a habitable condition.

In 1854, the Defendant *Cooke* applied for an account of rents to the Plaintiff, who offered to give up possession and furnish the accounts, upon being allowed the amount of his expenditure and the rent-charge. The Defendant refused to make the allowance and proceeded to eject the Plaintiff. The Plaintiff thereupon instituted the present suit for an injunction, and for a declaration that he was entitled to a lien upon the premises for the money expended in repairs, he submitting to account for the rents and profits.

Upon a motion for an injunction to restrain the action, it was granted, on the terms of the Plaintiff in equity giving judgment, and undertaking to abide by any order, as to damages, which the Court might make. The cause now came on for hearing.

Mr. *Lloyd* and Mr. *Howe*, for the Plaintiff. The state of the property was such, that it was hopeless to realize anything from it without repairing it. The repairs were necessary and executed in a proper and reasonable manner, and the property was thereby made  
tenantable

tenantable and a rent secured. It would be most unequitable to allow the Defendant to have the benefit of the rent without reference to the expenditure by which it was realized. The rent of the property is now about 40*l.* a year, which is attributable to the outlay, and the Plaintiff's claim is in the nature of a Welsh mortgage, to be repaid out of the income of the property. If the property could not be made profitable without making the repairs, the Plaintiff, of course, is entitled to apply the rents first in payment of the repairs, and then of his rent-charge. The Defendant's solicitor had notice that the repairs were being made, and did not object. All that is asked is to continue the injunction and to declare that the Plaintiff was entitled to repair, and he will ascede to any account.

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COOKE.

Mr. *R. Palmer* and Mr. *Whitbread*, for the Defendant. The legal contract between the parties was such, that upon payment to the Plaintiff of the arrears of the rent-charge, his estate ceased, and he was bound to give up possession. This Court cannot enlarge his interest into an estate in the premises, so as to put him on the footing of a mortgagee in possession, who has obtained the legal estate in the land by the very terms of his contract. Here there was nothing to authorize the Plaintiff to rebuild or repair, and he is not entitled to any allowance for an outlay wrongfully made. It is a mere legal right to be determined at law, and there is no equity to vary the contract. They cited *Pilling v. Armitage* (a); *Clare Hall v. Harding* (b); *Dann v. Spurrier* (c); *East India Company v. Vincent* (d).

Mr. *Lloyd*, in reply. According to the argument of  
the

(a) 12 *Ves.* 78, 85.  
(b) 6 *Hare*, 273.

(c) 7 *Ves.* 231.  
(d) 2 *Atk.* 83.

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the Defendant, if this had been agricultural land, and the Plaintiff had entered and cultivated it, and had sold the produce, he would have been entitled to no allowance for the expense of cultivation, or the outlay for the production of the crop. The outlay is incident to the nature of the contract; it was a necessary expenditure for the production of any rent, and the Defendant cannot have the benefit of the outlay without paying for it.

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July 25.

*The MASTER of the ROLLS.*

The house or property on which the Plaintiff's rent-charge was secured became dilapidated and the rent-charge fell into arrear, and the Plaintiff, being unable to discover the owners, and getting nothing from the property, entered into possession. The houses were untenable, and he obtained nothing by entering; and, to enable him to get something from the property, he caused the houses to be repaired, and then let them and received the rents. The Plaintiff has been in possession ten years, he has laid out considerable sums of money, which I assume to have been proper and necessary, to enable him to get anything from the property, and which have not been repaid to him. He has received the rents, which, though sufficient to pay the rent-charge, are not sufficient to reimburse him the money laid out in the repairs. The Defendant brought an action of ejectment against the occupying tenants for the purpose of recovering possession; and, on that being done, the Plaintiff filed a bill to obtain payment of the sums laid out and for an injunction to restrain the action until they had been repaid.

For the Plaintiff it is urged, that the powers of distress and entry, of themselves, import that the Plaintiff should

should be at liberty to pay the costs and expenses necessary for the recovery of rent, in the same way as the costs of distress and levy upon a tenant ought to be repaid him. He says, that if the property consisted of a meadow of hay, he would then be allowed the expenses of making and selling the hay, that what is asked is the same, and that the repairs are as much a necessary expense as the making or selling the produce.

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For the Defendant, it is contended, that the Plaintiff is not entitled to anything more than what the deed gives him, and that the construction of it must be the same at law and in equity; and, further, that the Plaintiff has admitted, by coming here, that he has no defence at law. I concur in the objection that the Plaintiff has a mere legal demand, and that coming here he must make out his right in the same manner as at law. I do not, however, think, that the circumstance that the Plaintiff has given judgment at law, without a trial, is to be treated as conclusive that he has no defence at law.

The result I have come to, on the fullest consideration, is, that the Plaintiff is not entitled to any relief in equity on the circumstances appearing before me. I thought, at first, that relief might be given, on the principle that when one has granted an interest in property to another, he also, by implication, grants all that is necessary to enable the grantee to enjoy the thing given; but, on reflection, I think that this principle, though applicable to necessary expenses of making a distress and entry, in selling the goods and gathering the crops, is not applicable to the present case; that it does not entitle the Plaintiff to lay out money as a mortgagee in possession, and to alter the character of the property. The distinction between this case and a mortgagee in possession

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possession is this:—At law, the mortgagee is absolute owner of the land, and has a right to deal with it as he thinks fit. The mortgagor comes to recover possession, notwithstanding his title at law is gone, but equity only gives relief on certain conditions, and will not give him possession, unless on the terms, not only of repaying all money due, but also all moneys which the mortgagee may properly have expended for the purpose of the sustaining and repairing the property.

The owner of the rent-charge has no estate in the land, he has only a right of entry, and, by perception of the rents, to pay off the arrears; he is entitled to enforce payment of his rent-charge only in that peculiar way. On the other hand, the owner of the estate subject to the rent-charge is not bound to have resort to equity, but when the arrears have been paid, he can obtain possession without coming to a Court of equity.

The right contended for by both parties being purely legal, it ought to be tried at law. The Plaintiff has mistaken his position, and the bill must be dismissed.

*August 2.* Mr. *Lloyd* moved, that in the decree, a direction might be introduced to vacate the judgment signed in the action at law pursuant to the Plaintiff's undertaking of the 14th of *March*, 1854, the Plaintiffs giving security for the rents in the event of the Defendants finally succeeding.

Mr. *Whitbread*, for the Defendant.

The Court being of opinion, that in case the Plaintiffs in equity should be advised that there was ground of defence at law to the action, the Plaintiffs would be entitled

titled to try the same, and that for that purpose the judgment in the action ought to be vacated; but the Plaintiff, being desirous to rehear the cause, did order, that execution on the judgment should not issue until the hearing of the appeal, the Plaintiffs giving security to account for the rent received since the date of the judgment at law.

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NOTE.—Affirmed by the Lord Chancellor, *January 25, 1856.*

ROSS v. ROSS.

**T**HOMAS GOLLY the testator, by his will, dated in June, 1807, gave 12,000*l.* consols to his executors, upon trust, as to one-third part, for his niece *Christian Ross* for life, and after her decease, upon trust to transfer and pay the same, "unto and for the benefit of all and every the child and children of the said *Christian Ross* who shall be living at the time of her decease, and of the *issue*, if any, then living, of such of her children as may have died in her lifetime, each of her surviving children to take an equal share, and the *issue*, if more than one, of such of her children as may have died in her lifetime to take equally amongst them the part or share which their *parent* would have been entitled to, if he or she had survived the said *Christian Ross*, and if but one, then to take a child's share." The

July 12, 13.

The word "issue" includes all remote descendants of the person whose issue is referred to, and the burden of proof lies upon him who contends the contrary. But when the word "parent" is used in reference to his "issue," the word issue is confined to his "children."

The word "issue," in reference to the word

"parent" in a substitutional gift, held, from the context of the will, not limited to "children."

Bequest to *C. R.* for life, with remainder to the children of *C. R.* who should be living at her decease, equally, and the issue then living of such of her children as might have died in her lifetime, the issue to take the share which their parent would have been entitled to had he survived *C. R.*, and if but one, then to take "a child's share." There was a gift over on the death of *C. R.* "without leaving a child or issue" generally. One of *C. R.*'s children predeceased her, leaving no children, but only a grandchild, who survived *C. R.* Held, that he took a child's share with *C. R.*'s children.



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testator then gave a third of the 12,000*l.* consols to each of two other nieces, their children and issue respectively, in exactly similar terms.

The will contained the following gift over,—“ And in case all my said nieces shall depart this life without leaving a child or *issue* of a child living at their respective deaths, then I will and direct that the said sum of 12,000*l.* £3 per Cent. Consolidated Bank Annuities shall, from and immediately after the decease of the survivor of my said three nieces, sink into and become part of my residuary personal estate.”

The testator, in another part of his will, had given 3,000*l.* consols to his nephew, with a gift over, “in case of his death in the testator’s lifetime *without lawful issue.*”

*Christian Ross* died in *November, 1850*, leaving three children, the children of a fourth child, and a grandchild of a fifth child, her surviving.

The question was, whether the grandchild was entitled to one-fifth of the trust funds.

Mr. *Lloyd* and Mr. *T. Smith Osler*, for the Plaintiffs, two of the three surviving children of *Christian Ross*. The word “issue,” in the gift to the issue of such of the children of *Christian Ross* as might have died in her lifetime, must be construed to mean “children,” because the testator has directed, that they should take the share which their *parent* would have been entitled to had he or she survived *Christian Ross*. From this it is manifest, that by “issue” the testator meant the correlative  
of

of "parent," that is, "child;" *Pope v. Pope* (a); *Pruett v. Osborne* (b); *Sibley v. Perry* (c); *Hedges v. Harpur* (d). The children and grandchildren, therefore, of *Christian Ross* are entitled to the trust fund, to the exclusion of the great-grandchild. [*The Master of the Rolls*.—There is no inconsistency here in holding "parent" to be "father" or "mother," and yet "issue" to be used in the general and ordinary meaning of the term. How do you restrict "issue?" If the parent of the great-grandchild of *Christian Ross* were alive he would have been entitled to a share.] If "issue" is not restricted here to children, it must have a different meaning in two places, accordingly as you consider it with reference to the grandchildren or the great-grandchild. The testator intended one substitution only, and not a series of them, through all generations of issue.

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Ross.

Mr. *E. F. Smith*, in the same interest with the Plaintiffs, cited *Edwards v. Edwards* (e).

Mr. *R. Palmer* and Mr. *Toller*, for *William Mair*, the great-grandchild of *Christian Ross*, contended, that "issue" was not to be restricted to "children" of the children of *Christian Ross*, but extended to grandchildren of children, for, according to the argument on the other side, there might have been an intestacy. The trust fund was to go over to the residuary legatees only in certain events, which had not happened, and if there had been no child or grandchild of *Christian Ross* at the time of her decease, and her only issue had been *William Mair*, or issue equally remote, and if "issue" was to be construed to mean "children" only, then there would have been an intestacy. But besides, it was clear, upon the authorities, that "issue" means grandchildren

(a) 14 *Beav.* 591.

(b) 11 *Sim.* 132.

(c) 7 *Ves.* 522.

(d) 9 *Beav.* 479.

(e) 12 *Beav.* 97.

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children as well as children; *Wyth v. Blackburn* (a); *Gule v. Bennett* (b); *Davenport v. Hanbury* (c); *Boyle v. Hamilton* (d); *Stoner v. Curwen* (e); *Dalzell v. Welch* (f).

Mr. Lloyd, in reply. To adopt the construction of the other side, there will be an indefinite series of substitutions, and the "parents" will be varying indefinitely. He referred to *Barker v. Barker* (g); *Bruckhato v. Malting* (h).

The MASTER of the ROLL.

There is great obscurity, undoubtedly, in cases of this description, and I have found some difficulty in coming to a conclusion upon this point, but I think that the observation which Lord Eldon made in *Sibley v. Perry* (i), that the construction is to be furnished from all the different parts of the will, and the design and tenor of it as manifested by its contents, is applicable to this case, and that it is an exception to the general rule to be derived from the cases to which reference has been made.

The great object is to discover the intention of the testator, and in construing wills, rules have been adopted, which are best fitted to carry into effect the general meaning and intention of the testator. Those rules, therefore, are liable to be modified, where the intention of the testator can clearly be discovered from the words he has used.

The first rule is this, that the word "issue" includes all

all remote descendants of the person whose issue is spoken of, and the burden of proof lies upon him who contends that it is to be restricted to a narrower signification.

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Ross.

The next rule is this, that when the word "issue" is used in reference to the "parent" of that issue, it must mean "his children," that is, the word "parent" confines the word "issue" to the "children" of the taker.

The difficulty which occurs in this case, in the application of these rules, appears to me to be this:—It is clear that the "issue" of the "parent" must mean the "children" of the "parent," but it is not certain, in every case (and it must be so before that rule can apply), that the testator has, by the word "parent," meant to signify the first taker, the child in the first instance. That was the case of *Sibley v. Perry* (a) and also of *Pruen v. Osborne* (b), and it was so in the case, before Sir William Grant, of *Harrington v. Lawrence* (c). Upon this clause in the will, if it had stood by itself, although my original opinion was not exactly in that form, I should have been disposed to concur with Mr. Lloyd, for I felt considerable difficulty in coming to any conclusion other than by referring the word "parent" to the child of *Christian Ross*, but even that is not free from ambiguity. The expression is this: "For the benefit of all and every the child and children of *Christian Ross*, who shall be living at the time of her decease, and of the issue of any then living of such of her children as may have died in her lifetime." Now that is perfectly general, "each of her said surviving children to take an equal share, and the

(a) 7 Ves. 522.

(b) 11 Sim. 132.

(c) Unreported, but referred to in 11 Sim. p. 138.

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 Ross.

the issue, if more than one, of such of her children as may have died in her lifetime to take equally amongst them the part or share which their parent would have been entitled to if he or she had survived *Christian Ross*." I am disposed to concur in the view that, if the matter had stood there, the case of *Harrington v. Lawrence* would have been applicable, and that the word "parent" must be referred to the child or children of *Christian Ross*, and yet it is obvious it might bear this construction:—it might mean the child of the parent who would have been entitled, if that parent had survived *Christian Ross*, that is to say, if one of the children had died leaving a child who had died leaving other children. It certainly is open to the objection that Mr. *Lloyd* pointed out, that there is a direction that the surviving children should take equally, and yet that is to some extent removed by the preceding words, which point to an intention that they should take *per stirpes*; but the will goes on in words which, if they had been used alone, would have left it quite clear that the issue, if consisting of one only, would have been entitled. For although, if the issue are more than one, they are to take a parent's share, if there be but one, that is, but one of such issue, that issue is to take, not the "parent's" share, but a "child's" share. Therefore, the express words are there direct, that if there be but one of such issue left, that one is to take a "child's" share. Then it is said that I must control these words, if I see that in the former part of it only the child of a child of *Christian Ross* is to take, although here is an express direction, that if there is only one of the issue left, it is to take but a child's share, which might let in the other and the larger construction.

It is admitted that, *primâ facie*, the same words in the same will must be taken in the same signification,  
 that

that the word "issue," if it is to be found in one part of the will, must bear the same construction as it bears in another part of the will; and the question which was put by Mr. *Lloyd* was this:—whether, in fact, you must not control the subsequent meaning of the word "issue" where it is used by the testator by the meaning to be derived from the original clause. Now, I have pointed out, that, in my opinion, in the clause of the bequest there is an ambiguity about it, because the two members of the clause are not exactly consistent with each other.

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Ross.

There are many instances in the will where the word "issue" is used in the same sense; but I go on, and find there are two cases in which it is used generally. I refer to that which is the most material, for the purpose of considering what the meaning of the word "issue" is in this passage of the will taken alone, and then in conjunction with the bequest before commented upon. The passage is this:—"And in case all my said nieces shall depart this life without leaving a child or issue of a child living at their respective deaths, then I will and direct that the said sum of 12,000*l.* £3 per Cent. Consolidated Bank Annuities shall, from and immediately after the decease of the survivor of my said three nieces, sink into and become part of my residuary personal estate."

If this clause had stood alone, I think nobody would have argued that the word "issue" there was to be confined to the children of a child; there are no words there to confine it to the children of a child or to the grandchild of a niece. It is a failure of issue of all classes at the time when the last niece dies. If, at the death of the last niece, there had been a grandchild of such niece alive, it is impossible to say that the gift  
over

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over would not have taken effect on these words standing alone; there are no expressions to cut it down. Then it is a direction that it shall fall into and form part of the residue immediately after the death of the survivor, in case, at the time the survivor dies, there shall be no child or issue of a child living of any of those nieces. I cannot find a larger or more comprehensive word, and, with respect to this part of the will, it appears to me to be so unambiguous, that I should be violating the ordinary and obvious meaning which is put upon the word "issue," where there is no expression used which could, in the slightest degree, control it, if I did not give it its full effect upon the present occasion. If it bears this meaning in this clause of the will, why is it not to bear the same meaning in the clause which I have already read? It is, in my opinion, quite distinct from the case of *Pruen v. Osborne*, and from *Harrington v. Lawrence*, and it is brought within the observations of Lord *Eldon*, who says, the whole scope of the will must be examined, and you must consider what is the construction which is furnished by the different parts of the will.

Mr. *Toller* pointed out clearly, what would be the effect of holding that grandchildren did not take; he assumes that, upon the death of *Christian Ross*, there was only a great-grandchild of the niece alive, that great-grandchild, according to the construction contended for by the Plaintiff, could not take. But then one of two things would follow, you must either cut down the effect of the meaning of the words of the gift over, which I have just read, and then say, that, notwithstanding there was issue living of one of the nieces at the death of the survivor, or possibly a great many, thirteen or fourteen, grandchildren, nevertheless they should take nothing, and it should fall into the residue,

residue, or, if you give those words their natural acceptance, and say, that that gift over does not take effect, you thus produce an intestacy, though there was a great number of grandchildren, who, according to the construction of the word "issue" of a child in the gift over, were objects of the testator's bounty.

1855.

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 v.
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Now, I find it extremely difficult to come to the conclusion that the testator could possibly, by the frame and scope of the will, have meant that. The whole thing is set right if you refer (which I admit is doing some violence to the language) in this part of the first gift to the "issue, if more than one of them such children to take equally amongst themselves that part or share which their parent would have been entitled to," if you refer the word "parent" there to such one of the children of the children of *Christian Ross*, that is, to the grandchildren of *Christian Ross*, who, if that parent had lived, would have taken the share which the child of *Christian Ross*, if that child had lived, would have taken, that is to say, it carries on the distribution *per stirpes*, not merely through the first degree, but extending it even to the second. That makes intelligible the subsequent expression, "that if there be but one of such issue, then that one is to take a *child's* share," but not a *parent's* share. Therefore, with more hesitation than I had at first when the matter was opened to me, I am of opinion, that the word "issue," in this case, is confined to the children of the parent, but that the word "parent" here does not mean the children of *Christian Ross*, but may mean a grandchild of *Christian Ross*. This makes the expression "issue," in the first part of the will, consistent with the use of it in the gift over, and is the only way in which the various parts of this will can be made quite consistent.

1855.



MORRIS v. ISLIP.

July 25.

In a suit by a mortgagor for redemption, a decree was made for an account with annual rests. The Plaintiff died and the suit was abandoned; after which, the mortgagee instituted a suit for foreclosure. Held, that the decree must be the same and with annual rests.

A SUIT was instituted by the mortgagor, and a decree was made by Lord *Langdale*, to take the accounts with annual rests. The mortgagor went abroad and the suit was abandoned. He afterwards died, and the present suit was instituted by the mortgagee against the representatives of the mortgagor for a foreclosure.

Mr. *J. H. Taylor*, for the Plaintiff, asked for the common decree, arguing that there was no evidence in the present suit to warrant a decree with annual rests.

Mr. *Steere*, for another party.

Mr. *R. Palmer*, and Mr. *W. R. Ellis*, for the principal Defendant, contended that, irrespective of the evidence, the decree must be the same as in the other cause, viz. for an account with annual rests. *Thorneycroft v. Crockett* (a) was cited.

The MASTER of the ROLLS.

I cannot make a decree inconsistent with that formerly pronounced by Lord *Langdale*. I shall direct the accounts to be taken up to the date of the decree on the footing of that decree.

I think it desirable, if possible, to adopt the accounts taken in the suit between the same parties.

(a) 2 *House of Lords Cas.* 239.

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2. The testator devised his real and personal estate to trustees to convert and invest, and pay the income to his daughter for life, and after her decease, to divide the fund among "all her children then living," provided all such children may then have attained twenty-one; if not, he directed the fund to be placed out at interest, and the interest, &c. to be applied for the maintenance and bringing up of all such children, until the youngest should attain twenty-one, when the fund was to be divided amongst such children as should be then living and the issue of such of them as should be dead, the issue to take their parent's share. Held, that a child who survived the mother, attained twenty-

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4. Bequest to *A.* for life of an annuity of 100*l.*, "by interest arising out of money to be vested for that purpose by the executors" in public funds or other good security, and after his death, "the said capital stocks so purchased" to *A.'s* children. By a codicil the testator said, "what I mean in my will by securing money in the public funds, is to purchase a capital stock" in the consols by my executors. Held, that the executors might either purchase in the consols or in other good security, but having done neither in the life of *A.*, his children were

entitled to 3,333*l.* 6*s.* 8*d.* consols, and not to 2,000*l.* cash. *Aspland v. Watte.* Page 474

5. The testator gave his real and personal estate, on trust to raise such a sum of money as, when invested, the dividends would realize the clear annual sum of 200*l.* a year, and to pay such dividends to his widow for life, and afterwards to stand possessed of the principal or trust monies in trust for his brothers and sisters. There was a gift to the same person of the residue, "after raising thereout the money sufficient to realize the annuity to his wife." On a deficiency of assets, held, that the *corpus* was liable to make good the widow's annuity. *In re Baker, Baker v. Baker.* 548

6. The testator directed the investment in the funds of sufficient to produce 40*l.* a year, and the dividends to be paid to his wife for life, and he bequeathed his general residue and the fund invested (after her death) to other persons. An investment was made in Five per Cents., which were reduced and produced less than 40*l.* Held, that the widow was entitled to have the deficiency made good out of the *corpus* of the fund. *Mills v. Drewitt.* 632

See POLICY OF ASSURANCE, 2.

REAL AND PERSONAL ESTATE,
3.

ANSWER.

The Court will not act on the testimony of a single witness against

the express denial on oath of the Defendant; but where the written evidence has been destroyed by the Defendant *pendente lite*, the Court will assume that, if forthcoming, it would have proved the statement of the single witness. *Gray v. Haig, Haig v. Gray.*

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APPEAL.

The time appointed for redemption enlarged, on terms, pending an appeal to the House of Lords. *Finch v. Shaw, Colyer v. Finch.* 555.

APPOINTMENT.

See POWER, 4, 5.

ATTORNEY-GENERAL.

Rule as to the appearance of the Attorney-General in charity cases. *Ware v. Cumberlege.* 503

BANKING COMPANY.

See CALLS.

BANKRUPT.

See FRAUDULENT PREFERENCE.
ORDER AND DISPOSITION.

BEQUEST.

See ABSOLUTE INTEREST, 1.
VESTED INTEREST.
WILL.

BREACH OF TRUST.

1. Trustees were empowered, with the consent of the wife, to lend the trust monies to the husband.

The wife authorized an immediate loan of part, and of the remainder at such times as the husband might require, and the husband covenanted to pay it in six months. The money was not called in, and was lost by the insolvency of the husband. Held, first, that the wife's consent could not be given prospectively; and, secondly, that the trustees were not bound to call in the money at the end of six months. *Child v. Child*.

Page 50

2. Two trustees having properly sold out trust money, one of them handed the cheque for the proceeds to the other, who misapplied it. Held, that they were both liable. *Trutch v. Lamprell*. 116
 3. It is a contradiction in terms to say, that a trustee who acts is not an active trustee, and a defence by a trustee, that he only acted for conformity's sake is unavailing. *Trutch v. Lamprell*. 116
 4. A trust fund settled on husband, wife and children in succession, was received by the husband, and lent by him to his brother. A bill by one trustee against the other trustee, the husband and wife, and omitting the brother and children, held sustainable, and a decree was made against the husband, reserving all rights against the brother and the trustees. *Hughes v. Key*. 395
- See ADMINISTRATOR.
- ANNUITY, 4.
- DISCRETION.
- EXECUTOR.

FORFEITURE, 1.

NOTICE, 3.

TENANT FOR LIFE, 3.

TRACING TRUST MONEY.

TRUSTEE, 4.

WRONG-DOER.

BYGONE RENTS.

See MORTGAGEE IN POSSESSION.

CALLS.

Specific legatees of shares in a banking company, held liable to pay the calls made subsequent to the testator's death. *Armstrong v. Burnet*. Page 424

See SPECIFIC LEGACY.

CHARITY.

See MORTMAIN.

COMMISSION.

See PRINCIPAL AND AGENT, 2.

CONFORMITY.

See BREACH OF TRUST, 3.

CONSTRUCTION.

See ABSOLUTE INTEREST.

ANNUITY.

BREACH OF TRUST.

CALLS.

CONTRACT.

CONVERSION.

FORFEITURE, 2.

INCONSISTENCY.

INTEREST, 1.

JOINT TENANTS.

MAINTENANCE.

POWER, 2, 3.

REAL AND PERSONAL ESTATE, 1, 2.

REMINISCENCE

REVIVOR.

CONTINGENT GIFT.

See **VESTED INTEREST.**

CONTRACT.

A contract requires two parties to it, and a man in one character can, with difficulty, contract with himself in another character. *Coltman v. Lester.* Page 356

CONVERSION.

Two persons seized of freeholds agreed to carry on business in partnership upon the premises for fourteen years, and that if either died during that term, the survivor should purchase the freeholds at a stated price. The fourteen years having expired, they, by parol agreement, continued the partnership "on the old terms." One afterwards died intestate. Held, that the stipulation as to purchase was binding, and that the freeholds were converted into personal estate, and did not pass to the heir. *Essex v. Essex.* 442
See **TROVER.**

CORPUS.

See **ANNUITY, 3, 5, 6.**

COSTS.

1. The Master having reported, under the provisions of the "Masters' in Chancery Abolition Act" (15 & 16 Vict. c. 80), that he was

unable to proceed with an order of reference by reason of the neglect of the parties to attend his summons, and the neglect being occasioned by the solicitor of the Plaintiff, the Court directed the reference should be proceeded with in chambers; and, the solicitor undertaking not to bring an action against the solicitor in respect of the conduct of the suit, it also ordered the solicitor to pay the costs of the Master's certificate and of the subsequent proceedings.

Ridley v. Tiplady. Page 44

2. A suit between two shipowners, and the mortgage of one, was dealt with as in an administration suit, by first directing the payment of all the costs (except the mortgagee's) out of the fund, and distributing the residue *pro rata*. *Alexander v. Simms,* 123.

3. The captain of a ship served a notice on the trustees of the docks, in which the cargo of the ship was being discharged, not to suffer its removal till the freight was paid, and wrote to the owners of the ship to inform them that he had stopped the cargo till the wages of himself and the seamen had been paid. In a suit between the owners and the mortgagee of one of them, the captain was made a party, and did not, by his answer, disclaim. The Chief Clerk found that certain sums were due to him in respect of wages, but that other sums claimed were not due. Held, that the Plaintiff was justified in making the captain a party, and that the

latter was justified in not disclaiming, and was therefore entitled to his costs. *Alexander v. Simms.* Page 123

4. A stock legacy, bequeathed to several in succession, was appropriated by the executors, and the residue paid over. In a suit between the remainderman and the executors alone, the legacy was transferred into Court, and the costs of suit were paid thereout. The tenant for life afterwards filed a claim to have the amount of costs recouped out of the residue. It was dismissed with costs. *Richardson v. Rusbridger.* 136
5. Costs of a journey to *Paris* to obtain the execution of a deed disallowed, beyond the expense of doing it through an agent. *In re Bevan.* 146
6. The co-trustee who had joined as co-plaintiff refused his costs. *Hughes v. Key.* 395
7. A simple contract creditor obtained an order to administer the intestate's estate. He afterwards had notice that the estate was insufficient to pay the specialty creditor and the costs of the administratrix, but he still persisted in prosecuting the suit. Held, that the fund must be applied, first, in paying the costs of the administratrix, then in paying the Plaintiff's costs down to the notice, and the residue in payment of the specialty creditor. *Sullivan v. Bevan.* 399
8. A creditor having continued his proceedings after notice of a decree

for administration, was ordered to pay the costs of a motion to restrain him, but was allowed to set them off against the costs of the proceedings at law incurred prior to the notice. *Gardner v. Garrett.* Page 469
See DOWER, 3.

INTERPLEADER SUIT.

LIEN.

MOTION.

TRUSTEE, 1, 2.

VENDOR AND PURCHASER, 3.

COVENANT.

See INDEMNITY.

CREDITOR.

See COSTS, 7, 8.

DOWER, 4.

CROSS-EXAMINATION.

A Plaintiff who has required a Defendant to make an affidavit as to the possession of documents, under the 15 & 16 *Vict. c. 86, s. 18*, may afterwards compel the Defendant to be cross-examined on such affidavit, under the 40th section. *Kay v. Smith.* 566

CUMULATIVE ANNUITIES.

See ANNUITY, 1, 2.

DEBT.

See POLICY OF ASSURANCE, 2.

DEBTOR AND CREDITOR.

See COSTS, 8.

DOWER, 4.

POLICY OF ASSURANCE.

UNDUE INFLUENCE, 2.

DECREE.

See MORTGAGE, 2.

DEED.

See ANNUITY, 1.

ESCROW.

FORFEITURE, 2.

INTEREST, 1.

LIEN, 2.

LOCO PARENTIS.

PAROL EVIDENCE.

RE MOTENESS.

DELAY.

1. A solicitor pending his employment took security for costs from a poor and illiterate client. Held, that assuming a judgment creditor of the client had the same rights as the latter, still that after ten years' acquiescence the accounts would not be opened. *Shaw v. Neale*. Page 157
2. A testator died in 1809; his daughter came of age in 1829; she then executed a release and married in 1836; her father died in 1850, and in 1852 she instituted a suit to make his estate liable for the profits made by him (he not being a trustee) by the employment of part of the trust monies in trade. The Court held, under the circumstances, that, assuming her right, there was nothing to justify the delay in instituting the suit. *Parker v. Bloxam*. 295
See EVIDENCE, 1.

DEMURRER.

1. A testator gave his estate to the Plaintiffs (his executors) in trust

for his son for life, remainder to his daughter in law for life, remainder to their children. The son effected a compromise with an annuitant under the will, by means of part of the testator's assets advanced by the Plaintiffs. He died leaving his widow his executrix and universal legatee. A decree was made to administer the first testator's estate, wherein the executors were disallowed both the money advanced for the compromise and the annuity which was the subject of it. They filed a second bill against the widow and children to have the rights of the parties under the compromise settled, and to determine other questions arising between them and the son. A demurrer for multifariousness and want of equity was overruled. *Rump v. Greenhill*. Page 512

2. When there is a demurrer for multifariousness on the record, the Defendant may demur *ore tenus* for want of equity. *Ibid*.
3. *A. B.*, being entitled to a share of the produce of a testatrix's real and personal estate, instituted a suit for its recovery and obtained a decree. *C. D.* afterwards filed a bill of revivor and supplement, stating that *A. B.* was domiciled at *Stuttgart*, and that by a decree of the Court there, he had been appointed "*curator bonorum*," and directed to get in the property for *A. B.*'s creditors. The bill prayed a revivor, and liberty to prosecute the original suit, for payment and

additional relief. A general demurrer was allowed, on the ground that the relief thus prayed could only be obtained by original bill. *Stackle v. Winter.* Page 550

DEVASTAVIT.

See EXECUTOR.

DEVISE.

See JOINT TENANTS.

REAL AND PERSONAL ESTATE,
1, 2.

REAL ESTATE.

RESIDUE, 1.

WILL.

DISCOVERY.

See PRODUCTION.

DISCRETION.

The discretion of directors to forfeit shares for nonpayment of calls is a trust, to be exercised for the benefit of all the shareholders. *Harris v. The North Devon Railway Company.* 384

DOWER.

1. Dower of a woman, married after the Dower Act, out of an estate made subject to dower by that statute, held not to be excluded by a declaration against dower contained in a conveyance prior to the act. *Fry v. Noble.* 598
2. In 1827, freeholds were conveyed to *A. B.*, a married man, to the usual uses to bar dower, "to the intent that his then present or any future wife might not be entitled to dower." In 1834, the Dower

Act passed, giving dower out of estates thus limited (s. 2), but allowing the right to be defeated by a declaration against dower in the conveyance (s. 6), and providing, that the act should not extend to any widow married before 1834, or to give to any deed previously executed the effect of defeating any right of dower. *A. B.* contracted a second marriage in 1838, and died seised. Held, that the declaration in the conveyance did not defeat the second wife's right to dower out of the estate.

Fry v. Noble Page 598

3. Costs allowed to a widow, in a suit for dower, her right thereto being contested. *Ibid.*
4. By Sir John Romilly's Act, freeholds and copyholds of a deceased are now assets for the payment of his debts, and, by the Dower Act, all debts to which the land of a deceased are subject, are "valid and effectual as against the right of his widow, to dower." Held, nevertheless, that the widow's right to dower or freebench has still priority over mere creditors of a deceased. *Spyer v. Hyatt.* 621

ELECTION.

1. To constitute a settled and concluded election, there must be first clear proof that the person was aware of the nature and extent of his rights; and, secondly, that having that knowledge, he in-

tended to elect. *Worthington v. Wiginton.* Page 67

2. A testator having invested a sum of money in stock in the joint names of himself and his wife, gave his freehold and leasehold estates, and the specific stock to her for life, with remainders over, and he appointed her his sole executrix and residuary legatee. The wife, after her husband's death, had the stock transferred into her own name, and did not include it in the estimate for the purposes of probate. She recovered debts as executrix, occupied one of the houses, and received the rents of the estates; and on her second marriage, she transferred the stock into the names of herself and of another person, in trust for herself for life for her separate use, and then as she should appoint by will. She died sixteen years after the testator, and it was found by the Master that it would have been greatly to her disadvantage to have elected to take under the will. Held, nevertheless, that she had elected so to take. *Worthington v. Wiginton.* *Ibid.*

ENJOYMENT IN SPECIE.

See TENANT FOR LIFE, 1, 2.

EQUITABLE MORTGAGE.

1. An informal document, signed by a trustee who was indebted to the trust, construed to amount to an equitable mortgage in favour of the trust, notwithstanding a denial

by the answer. *Baynard v. Woolley, Wearing v. Baynard.*

Page 583

2. Title deeds were deposited by the Defendant with the Plaintiff as an indemnity against contingent payments, but there was no agreement to execute a formal mortgage. Before the Plaintiff had made any payment, he filed a bill to have a formal mortgage executed. Held, that he was not entitled thereto, but only to a memorandum signed by the Defendant specifying the terms of the deposit. *Sporle v. Whayman.* 607

See FORECLOSURE.

EQUITY.

See ACCOUNT.

INDEMNITY.

INJUNCTION, 3.

MISREPRESENTATION.

RENT-CHARGE.

WRONG-DOER.

ERROR AND MISTAKE.

See TAXATION, 2.

ESCROW.

- A. mortgaged property to three trustees, B., C. and D. Some time after, B., who was a solicitor, having in his hands a sum belonging to a client, E. proposed to lay it out on a transfer of the mortgage. He prepared a transfer, which was executed by A., B. and C., but not by D., and a receipt for the money was signed by B. and C. alone. No money was ever paid, and it was lost by B.'s in-

solvency. Held, that the alleged transfer to *E.* was ineffectual, the consideration not having actually been paid, and that in equity the deed was inoperative both as against the mortgagor and the three trustees. *Griffin v. Clowes.*

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EVIDENCE.

1. Seven months after notice of motion for a decree, the Defendant had given material evidence in another cause. On the application of the Plaintiff, nine days afterwards, the Court gave leave to use the additional evidence, though the cause was on the paper, but permitted the Defendant to explain it. *Watson v. Cleaver.* 137
2. Evidence of the general reputation of the insanity of a person, in the neighbourhood in which he resided, is inadmissible to prove that a person was cognizant of that fact. *Greenslade v. Dare.* 284
3. A witness, examined under a bill to perpetuate testimony, was very old, and unable, through illness, to leave his home without danger; another was resident in *Canada*. Their depositions were ordered to be published, and production at the trial about to take place, and that either party might make such use of them "as by law they can." *Biddulph v. Lord Camoys.* 402
4. Admissibility of evidence of a parol contract as to the continuance of a partnership where real estate is concerned. *Essex v. Essex.*

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See ACCOUNT, 1.

ADMISSION OF FACTS.

ANSWER.

LIEN, 4.

MORTMAIN.

PAROL EVIDENCE.

PRINCIPAL AND AGENT, 5.

SPOILIATION.

SUBPŒNA.

EXCHANGE.

1. The Inclosure Commissioners can, under the provisions of the General Inclosure Act (8 & 9 Vict. c. 118), authorize an exchange though no inclosure is contemplated, which will be binding on persons under legal disability; and under their authority an exchange may be effected by parties having a limited interest of common socage tenure for lands of gavelkind tenure in different counties. *Minet v. Leman.* Page 269
2. Where, under this act, gavelkind lands in *Kent* are exchanged for common socage in *Middlesex*, the tenures of the exchanged lands are not altered, but the *Kent* lands remain of gavelkind tenure, and the *Middlesex* lands of common socage tenure. (Per the Master of the Rolls, *sed quære.*) *Ibid.*
3. The 94th section of the 8 & 9 Vict. c. 118, is confined to the exchanges in cases of inclosure mentioned in the 92nd section. *Ibid.*
4. The possible evils and inconveniences arising from the extensive powers of exchange given by the Inclosure Act (8 & 9 Vict. c. 18) are provided for by the ap-

pointment of commissioners, whose duty it is to ascertain and approve of the propriety of the exchanges before they can be effected. *Minet v. Leman*. Page 269
See STATUTE.

EXECUTOR.

1. An executor cannot carry on the trade of his testator, except for the purpose of winding it up, but he may, and in some cases is bound, to complete contracts entered into by his testator. *Collinson v. Lister*. 356
2. When part of the testator's property is invested on mortgage, the executor is justified in making such further advances as may be absolutely necessary to secure the first advance, *semble*. It would be dangerous to lay down any rule which would prevent the executor from exercising a *bond fide* discretion in such case, or even charge him with a *devastavit* in case the result should disappoint his expectations. In case of loss, however, the *onus* lies on him of shewing that he exercised due caution. *Ibid*.
3. A testatrix had advanced money on mortgage of a ship. At her death it was under repair, and the shipbuilders refusing to part with it until payment, the executor, without due consideration, borrowed money and paid off the lien. He afterwards mortgaged the ship to secure the loan he had contracted. The ship produced less than the sub-mortgage. Held, that the executor's negligence inca-

pacitated him from charging the estate with the advances, and that his mortgagee having notice was not in a better condition. *Collinson v. Lister*. Page 356
See INDEMNITY.

LIEN, 3.

EXONERATION.

A testator gave his real and personal estate to trustees, and directed them to pay the income to his wife for life, and after her death, to sell his real estate, "and out of the money to arise therefrom, in the first place," to pay to A., B. and C. the following sums (specifying them), and upon trust to invest "the remainder of the money to arise from such sale," and stand possessed thereof and of his personal estate, in trust to pay certain annuities, and he gave the residue to the Plaintiff. Held, by the Master of the Rolls, that the bequests to A., B. and C. were payable solely out of the real estate, but the decree was varied by the Lords Justices. *Fream v. Dowling*. 624

EXTRINSIC EVIDENCE.

See EVIDENCE, 4.

PAROL EVIDENCE.

FEME COVERT.

See FINES AND RECOVERIES ABOLITION ACT.
HUSBAND AND WIFE.

**FINES AND RECOVERIES
ABOLITION ACT.**

1. Though no assignment can be made of the reversionary interest of a married woman, so as to bind her, in the event of the death of her husband in her lifetime and before it falls into possession, yet a perfect conveyance may be made by her and her husband, under the Fines and Recoveries Act, of a reversionary interest in the produce of real estate directed to be sold. *Tuer v. Turner*. Page 560
2. The acknowledgment of a deed by a married woman under the "Act for the Abolition of Fines and Recoveries" (3 & 4 Will. 4, c. 74) may be made after the deed is inrolled, and, if so made, will be valid. *In re the London Dock Act, Ex parte Taverner* 490
3. A *feme covert*, tenant in tail, executed a disentailing deed on the 12th of December, 1842, which was enrolled on the 10th of June, 1843, but was not acknowledged by her until the 17th of September, 1845: Held, that it was effectual to bar the entail. *Ibid*.

FORECLOSURE.

An equitable mortgagee, as of right, is entitled to a foreclosure, and not to a sale. *Cox v. Toole*. 145

FORFEITURE.

1. Directors had power, on nonpayment of calls, to sue for them or forfeit and sell the shares. They proposed to a shareholder to re-

lieve him from further liability, on his consenting to an absolute forfeiture. He assented, but the Directors, having afterwards discovered that he was in good circumstances, refused to complete. The Court declined to compel the Directors specifically to perform the contract. *Harris v. North Devon Railway Company*.

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2. Funds were, in 1823, settled on a wife for life, with remainder to the husband "until" he should "make any composition with his creditors for the payment of his debts, although a commission of bankruptcy should not issue against him." In 1842, his principal creditors agreed to take a composition on their debts secured by bills. The wife died in 1852. Held, that the composition, though not with the whole of his creditors, and was made during the wife's life, and did not affect the trust property, nevertheless operated as a forfeiture of the husband's interests. *Sharp v. Cosserat*. 470

FRAUD.

See ADMINISTRATOR.

MISREPRESENTATION.

NOTICE.

PRINCIPAL AND AGENT, 1, 2, 4.

RIGHT OF PRE-EMPTION.

TRACING TRUST MONEY.

UNDUE INFLUENCE.

FRAUDULENT PREFERENCE.

A trustee, with the consent of his *cestui que trust*, pledged *Madras*

government notes, held by him in trust for the benefit of a firm of which he was partner. The notes were afterwards redeemed and delivered to the firm. Subsequently, the firm, without the consent of the *cestui que trust*, pledged them for a similar purpose. The firm being insolvent and bankruptcy imminent, the trustee redeemed the notes with partnership assets, indorsed them to himself personally, and replaced them in his private chest. The firm became bankrupt. Held, first, that the notes were not in the order and disposition of the firm; and, secondly, that there was no fraudulent preference. *Sinclair v. Wilson*. Page 324

FURTHER ADVANCES.

See MORTGAGE, 1.

GAVELKIND.

See EXCHANGE.

GENERAL ORDER, 26TH OF 7TH AUGUST, 1852.

See EVIDENCE, 1.

GIFT.

See ANNUITY, 1.

GIFT OVER.

See VESTED INTEREST.

GOODWILL.

1. Claim of retiring partner to a share in the value of the goodwill of the

business disallowed. *Hall v. Hall*.

Page 139

2. Two persons entered into partnership for twenty-one years, but in consequence of disagreements and misconduct, disputes ensued. The partnership was dissolved by decree, one consenting to retire and the other to take the stock and effects at a valuation. *Ibid*.
3. Held, that the retiring partner was not entitled to any allowance for his share of the goodwill, no provision being made by the partnership articles for such an allowance on a dissolution by death or by the retirement of one partner by notice during the term. *Ibid*.

GUARDIAN.

See SPECIAL CASE.

HEIR.

See TESTACY.

HUSBAND AND WIFE.

The Court, under very peculiar circumstances, ordered the whole income of a fund in Court belonging to a *feme covert*, who had committed adultery, to be paid to her on terms. *In re Levin's Trust*. 378
See FINES AND RECOVERIES ABOLITION ACT, 1.

INCLOSURE.

See EXCHANGE, 3.
STATUTE.

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INCLOSURE ACT.

See EXCHANGE.

INCONSISTENCY.

In construing a will, if two passages in it are directly opposed to each other, the latter will prevail; but where there is a mere inconsistency, the Court will endeavour to discover, from the whole, the real meaning of the testator, and, if possible, reconcile all its parts. *Brocklebank v. Johnson.* Page 205

INDEMNITY.

The executors of a lessee held entitled to no further indemnity against the covenants than the personal indemnity of the residuary legatees. *Dean v. Allen.* 1

INFANT.

See GUARDIAN.

RELEASE.

WARD.

INJUNCTION.

1. The Plaintiff, before filing interrogatories, moved for an injunction to stay proceedings at law. The Defendant filed an affidavit displacing the grounds of defence at law. The injunction was refused. *Chilton v. Campbell.* 581
2. The Plaintiff instituted a creditors' suit against the executor. The estate was accordingly administered, and a decree was made on further directions. The executor afterwards brought actions against the Plaintiff, for debts

alleged to be due from him to the testator, which the Court restrained by injunction. The Plaintiff having died, the Defendant moved, that the suit might be revived by his representatives, or in default, that the injunctions might be dissolved. The proceeding was held irregular, and the motion was refused with costs. *Oldfield v. Cobbett.*

Page 563

3. Plaintiff relieved from a judgment at law given by consent, as the price of an injunction in equity, the point in issue having turned out to be legal and not equitable. *Hooper v. Cooke.* 639

INROLMENT.

See FINES AND RECOVERIES ABOLITION ACT, 2, 3.

INTEREST.

1. A mortgage deed made no provision for interest, and the mortgagee agreed, upon payment of the principal sum, to reconvey. Held, that the mortgage carried no interest. *Thompson v. Drew.* 49
2. Under a direction to raise 5,000*l.* for the benefit of *A.* and her issue, followed by a direction to raise and pay interest at five per cent. on that sum to *A.* during her life, with a gift over to her children of the "principal sum." Held, that interest at five per cent. was not to be charged on the estate during the whole life of *A.*, but merely until the 5,000*l.* had been raised. *Cole v. Lee.* 265

INTERPLEADER SUIT.

The Plaintiff in an interpleader suit disallowed the costs of proceedings taken by him in the suit subsequent to his receiving notice of the withdrawal of the adverse claims. *Symes v. Magnay*.

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INTESTACY.

A testator devised the residue of his real estate to a trustee, until one of his grandsons attained twenty-one; and in case his grandson *Thomas* attained twenty-one, in trust to pay him "the future rents." He bequeathed to the same trustee the residue of his personal estate to accumulate until one of his grandsons attained twenty-one; and he directed payment of "the aggregate" of the residue of his personal estate and its accumulations and the accumulations of the rents to his grandson *Thomas*, from and after his attaining twenty-one. There was an interval of three years between the eldest grandson *Thomas* attaining twenty-one. Held, that the rents during that interval were undisposed of and passed to the heir at law. *Mariott v. Turner*.

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IRREGULARITY.

See TAXATION.

ISSUE.

1. The word "issue" includes all remote descendants of the person whose issue is referred to, and the burden of proof lies upon him who

contends the contrary. *Ross v. Ross*. Page 645

2. But when the word "parent" is used in reference to his "issue," the word issue is confined to his "children." The word "issue," in reference to the word "parent" in a substitutional gift, held, from the context of the will, not limited to "children." *Ibid*.
3. Bequest to *C. R.* for life, with remainder to the children of *C. R.* who should be living at her decease, equally, and the issue then living of such of her children as might have died in her lifetime, the issue to take the share which their parent would have been entitled to had he survived *C. R.*, and if but one, then to take "a child's share." There was a gift over on the death of *C. R.* "without leaving a child or issue" generally. One of *C. R.*'s children predeceased her, leaving no children, but only a grandchild, who survived *C. R.* Held, that he took a child's share with *C. R.*'s children. *Ibid*.

JOINT TENANTS.

1. Under a devise to the children of *A.* and to the heirs of their respective bodies, the children take as joint tenants for their lives, with several inheritances in tail; but under a devise to them and the heirs of their bodies respectively, they take as tenants in common in

tail. *In re Tiverton Market Act*,
Ex parte Tanner. Page 374

2. A devise to *A.* and *B.*, and their "respective heirs," gives to them a joint tenancy for life with several inheritances in fee. *Ibid.*

JOURNEY.

See COSTS, 5.

JUDGMENT.

1. Under the 1 & 2 *Vict.* c. 110, and 2 & 3 *Vict.* c. 11, if a judgment creditor neglects to re-register within five years, the judgment becomes inoperative, as to purchasers, mortgagees and creditors (both anterior and subsequent) until re-registration, from which period alone it then operates as against them. (*Sed quære* as to anterior judgments.) *Shaw v. Neale*. 157
2. An estate was mortgaged to *A.*, and afterwards to the Defendant; the Plaintiff subsequently obtained a registered judgment against the mortgagor. The Defendant then purchased the equity of redemption, without searching for judgments. On a bill to charge the equity of redemption with the judgment, the Court held, that the defence of "purchase for valuable consideration without notice" was available in this case; secondly, that on the evidence, no notice was proved; thirdly, that it was not incumbent on a purchaser to search for judgments. *Lane v. Jackson*. 535

See ABATEMENT, 1.

VOL. XX.

ALLOCATUR.

INJUNCTION, 3.

TOLLS.

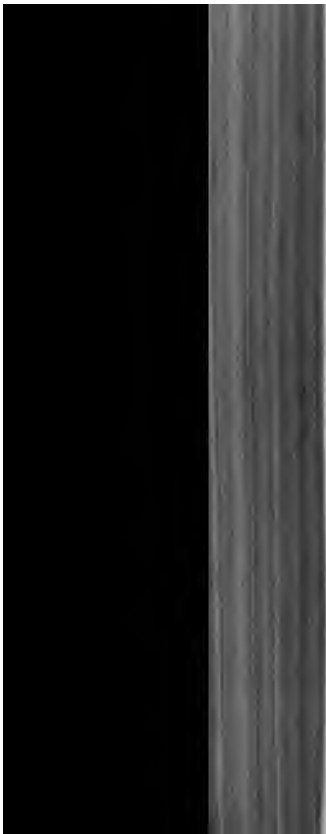
JURY.

1. This Court will not send a question to be tried by a jury, unless it entertains serious doubt on the matter. *Gray v. Haig*. *Haig v. Gray*. Page 219
2. The Court will not send to be tried by a jury a question which is supported by competent evidence, and which, if untrue, could have been disproved by evidence in the possession of one party, who has taken means to prevent it being made available for the determination of the question by the Court. *Ibid.*

LACHES.

1. Executors were to make an investment to produce an annuity of 100*l.* for *A.* for life, and the capital was then given to *A.*'s children. No investment having been made the children were held entitled to 3,333*l.* consols and not to 2,000*l.* sterling. On the death of *A.* in 1843, his children, on receiving 2,000*l.*, executed a release, which, after reciting that according to the trust 2,000*l.* had been set apart to answer the annuity, they released the first representative of the testator from all claims and demands. In 1854, the children instituted a suit to recover the amount of consols which would

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2. The testator directed the investment in the funds of sufficient to produce 40*l.* a year, and the dividends to be paid to his wife for life, and he bequeathed his general residue and the fund invested (after her death) to other persons. An investment was made in Five per Cents., which were reduced and produced less than 40*l.* Held, that the widow was entitled to have the deficiency made good out of the *corpus* of the fund, and the widow having received less than 40*l.* for thirty-three years, Held, that there had been no laches or acquiescence, the question now relating to the respective rights of parties to an existing trust fund. *Mills v. Drewitt.* 632

See DELAY.

LAPSE OF TIME.

LAPSE OF TIME.

A testator, who died in 1833, bequeathed two cottages to his executor, in trust to sell and retain a debt due to him from the testator.

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deeds as against himself and to the extent of his own interest.

Turner v. Letts. Page 185

3. A suit was instituted by persons entitled in remainder against the executrix (who was also the tenant for life) for the administration of the estate. The executrix died pending the suit, and her solicitor claimed a lien for his costs on deeds relating to leaseholds which had been placed in his hands by the executrix. The Master of the Rolls was of opinion, that, independently of the suit, the executrix could give no lien as against those in remainder for costs for which she was personally liable, and that in the suit, the costs has been lost by the abatement, and therefore that no lien existed. But the Lords Justices considered, that the solicitor's lien depended on whether the executrix was or not indebted to the estate, and they put this in a train of investigation. *Ibid.*

4. The lien of a solicitor on documents does not relieve him from the necessity of producing them for the purposes of evidence at the instance of third parties. *Hope v. Liddell.* 438

LIFE POLICY.

See POLICY OF ASSURANCE.

LIMITATION.

See JOINT TENANTS.

LOCO PARENTIS.

A. B., by two deeds, made provision for his natural children and their

mothers. Held, that the fact, that the settlor could not place himself in *loco parentis* as to the latter, shewed that it was not his intention to do so as to the former.

Palmer v. Newell. Page 32

LUNACY.

The Plaintiffs sought to set aside a conveyance made by their ancestor, as they alleged, while a lunatic, under undue influence and for an inadequate consideration. The Defendant, who claimed under a derivative title from the purchaser, insisted, that he was a purchaser for valuable consideration without notice. No notice, actual or constructive, having been proved, the Court refused to interfere, and dismissed the bill with costs. *Greenslade v. Dare.* 284
See EVIDENCE, 2.

MAINTENANCE.

1. Bequest for "maintenance" of a child, held not to cease on his death, but to pass to his representative. *Bayne v. Cromther.* 400
2. Bequest of leaseholds, in trust to pay half of the rents to *A.* for life, and the other half to *B.* for life, and in case of the death of either, his share of the rents "to be paid and applied for the maintenance of his children," until the decease of the survivor of *A.* and *B.*, and then to sell and divide equally between the children of *A.* and *B.* After the death of *A.*,

one of his children died. Held, that his representative was entitled to a share in the rents until the death of *B.* *Bayne v. Crowther.*

Page 400

MARRIAGE.

See *WARD.*

MARRIAGE CONTRACT.

See *MISREPRESENTATION.*

MARSHALLING.

Two properties, *X.* and *Y.*, were mortgaged to *A.*, and afterwards *X.* alone was mortgaged to *B.* Held, that *B.* was entitled to have the securities marshalled so as to throw *A.*'s mortgage in the first instance on estate *Y.* *Gibson v. Seagrim.*

614

MERGER.

A., the owner of a freehold estate, subject to a mortgage in fee to secure 1,300*l.*, devised and bequeathed his real and personal estate to *B.* the mortgagee. *B.*, in his residuary account, stated, that he had retained 467*l.*, out of the personal estate, towards payment of his mortgage debt. Afterwards *B.* devised the property to three relatives of *A.*, "provided they undertake to receive the same with all the liabilities attaching thereunto." Held, first, under the circumstances, that the mortgage had not merged in the fee; and, secondly, that the three took the estate subject to the payment of the balance of the mortgage debt. *Hutch v. Skelton.*

453

MISDESCRIPTION.

See *PLEA.*

MISREPRESENTATION.

1. Where, upon the marriage of two persons, a third party makes a representation, upon the faith of which that marriage takes place, he will be bound to make good that representation. *Bold v. Hutchinson.* Page 250
2. A father represented to the intended husband of his daughter, that, on the death of himself and his wife, the daughter would have 10,000*l.* at the very least; that he had made no eldest son, and that all his children should share equally; and the intended husband at the time made a memorandum in writing of the representation. Heads of marriage articles were prepared by or by the direction of the father providing, among other things, that he should covenant that the daughter would, at the death of himself and his wife, be entitled to 10,000*l.* and upwards. The settlement made in pursuance of these instructions did not contain any such covenant, but there was a recital that the daughter would be entitled to the 10,000*l.*, and the father was a party to the deed. The share coming to the daughter under her father and mother's marriage settlement fell short of 10,000*l.*, and no addition was made to it by the father in his lifetime or by will. Held, that the representation made by the father must

be made good by him, and that his estate must make up the deficiency. *Bold v. Hutchinson.*

Page 250

3. In cases of this description, in Courts of Equity, the moral obligation is co-extensive with, and not different from, the legal obligation where the representations are expressed in clear and distinct language; but vague and ambiguous representations made to persons, leading them to form an opinion or belief, though morally, are not legally binding. *Ibid.*

See UNDUE INFLUENCE, 2.

MORTGAGE.

1. An estate was mortgaged to *A.* for a sum and further advances. Afterwards *B.* obtained a charge on the estate by means of a judgment. Held, that further advances made to the mortgagor by *A.*, after notice of the judgment, had no priority over *B.*'s claim.

The doctrine of the case of *Gordon v. Graham* (2 Eq. Ca. Abr. 598) doubted. *Shaw v. Neale.* 157

2. In a suit by a mortgagor for redemption, a decree was made for an account with annual rests. The Plaintiff died and the suit was abandoned; after which, the mortgagee instituted a suit for foreclosure. Held, that the decree must be the same and with annual rests. *Morris v. Islip.* 654

See APPEAL.

EQUITABLE MORTGAGE.

ESCROW.

FORECLOSURE.

INTEREST, 1.

JUDGMENT, 2.

MARSHALLING.

MERGER.

MORTGAGEE IN POSSESSION.

TACKING.

TENANT IN TAIL.

TOLLS, 1.

MORTGAGEE IN POSSESSION.

No account of bygone rents will be directed against a mortgagor in possession, nor against his agent, nor against a person claiming under his voluntary revocable deed. *Hele v. Lord Bexley, Whitfield v. Bowyer, Whitfield v. Knight.*

Page 127

MORTMAIN.

1. After the passing of the Mortmain Act (1736) lands were devised to trustees for a charity. The rents were so applied by the trustees and their heirs down to the present time. On an information against the heir to correct abuses, he set up the invalidity of the devise, but the Court held, that the *onus* of proving no other mode had been adopted to make the charity valid was on him, and that every presumption would be made in support of its validity. *Attorney-General v. Moor.* 119
2. The shares of an incorporated company, where the substance of the undertaking is a dealing with land, are within the Statute of Mortmain, unless specially exempted. *Ware v. Cumberlege.* 503

3. Bequest of shares in the *Grand Junction Waterworks Company* to a charity, held invalid. *Attorney-General v. Moor.* Page 503

MOTION.

- Parties, though not formally served with a notice of motion, yet substantially made Respondents, held entitled to their costs. *Shaw v. Forrest.* 249
See EVIDENCE, 1.

NEXT OF KIN.

1. *A.* bequeathed a leasehold for the benefit of *B.*, and gave her a power to appoint it by will, and, in default, to *A.*'s "nearest of kindred, precisely in the same manner directed by the statute made for the distribution of intestates' effects." On *B.*'s death without appointment, held, that the next of kin of *A.* at her own death, and not those at the death of *B.*, were entitled. *Markham v. Ivatt.* 579
2. The term "nearest of kindred," with reference to the Statute of Distributions, has the same meaning as "next of kin." *Ibid.*

NEXT PRESENTATION.

1. *A.*, by will, directed trustees, upon the death of the present incumbent, to present *A.* to the living of *S.*, in case he should take Orders; and if he should not, or taking Orders should die in the lifetime of *B.*, then to present *B.*, in case he should take Orders; and after

their several deceases, or of such of them as should take Orders and be presented, or in the event of neither taking Orders, she devised the advowson to *C.* in fee. Held, that the gifts in favour of *A.* and *B.* were in succession and not alternative, and that on the death of *A.*, *B.* was entitled to be presented. *Hatch v. Hatch.* Page 105

2. A testator having the power of disposing of an advowson, (subject to the existing incumbency of *A.*, and a contingent right of *B.* to be afterwards presented) devised "the next avoidance thereof" in favour of *C.* Held, that "the next" meant, the next the testator had power to dispose of, viz., that following the incumbency of *A.* and of *B.* *Ibid.*

NOTICE.

1. The absence on a deed of a receipt for the consideration, though it is notice of its non-payment, is not constructive notice of other irregularities in the transaction. *Green-slade v. Dare.* 284
2. The doctrine of *Kennedy v. Green* (3 *Myl. & K.* 699) requires to be administered with the greatest care and delicacy, and to be so acted on as, on the one hand, to protect a purchaser for valuable consideration against all the world, and, on the other, so as not to encourage fraud, by permitting a purchaser to disregard the plain and obvious marks and symbols of it. *Ibid.*
3. A specific legacy of 6,000*l.* Consols, bequeathed to the Plaintiffs,

was unnecessarily and improperly sold out by the administrator (*A.*), with the aid of *B.*, and the produce carried partly to the banking account of *A.*, and the remainder to that of *B.* A series of shuffling of cheques and transfer of moneys took place, but 2,908*l.* was traced to *B.* About this time *B.* laid out moneys in the purchase of a *post obit* security, and though the trust moneys could not be distinctly traced into the securities, yet the Court held, from the suspicious character of the transactions, that such was the just inference, so far as to throw on the other side the *onus* of disproving it, and this not having been done, the Court held, that the Plaintiffs had a charge on the securities for the 2,908*l.* and interest. In addition to this, *B.* had sold and transferred the securities to *C.*, in consideration of a debt then owing. *C.* had notice that the money by which the securities had been obtained had been derived from *A.*, though she had no notice of the breach of trust. Held, that *C.* could not set up an adverse title as against *A.*, and *à fortiori*, that she could not do so as against the Plaintiffs (*A.'s cestuis que trust*). *Harford v. Lloyd.* Page 310

See ADMINISTRATOR.

EXECUTOR, 3.

JUDGMENT, 2.

ORDER AND DISPOSITION, 1.

TRACING TRUST-MONEY.

ORDER AND DISPOSITION.

1. *A.* (a retiring partner) agreed to assign a policy (part of the partnership assets) to *B.* (the continuing partner) on certain terms. *B.* mortgaged it to *C.*, who gave notice to the office. *B.* afterwards became bankrupt. Held, that the policy was not within the order and disposition of *B.* either as against *A.* or *C.* *In re Langmead's Trusts.* Page 20
2. A trustee, with the consent of his *cestui que trust*, pledged *Madras* government notes held by him in trust for the benefit of a firm of which he was partner. The notes were afterwards redeemed and delivered to the firm. Subsequently the firm, without the consent of the *cestui que trust*, pledged them for a similar purpose. The firm being insolvent, and bankruptcy imminent, the trustee redeemed the notes with partnership assets, indorsed them to himself personally, and replaced them in his private chest. The firm became bankrupt. Held, first, that the notes were not in the order and disposition of the firm; and, secondly, that there was no fraudulent preference. *Sinclair v. Wilson.* 324

ORDER OF COURSE.

See TAXATION, 1.

OPINION OF COUNSEL.

See PRODUCTION.

See EVIDENCE, 2, 4.

PARTIES.

See COSTS, 3.

PARTNER.

See CONVERSION.

GOODWILL.

PARTNERSHIP.

SOLICITOR.

PARTNERSHIP.

1. The partnership between *A.* and *B.* was dissolved and *A.* retired. *A.*, by deed, agreed to execute an assignment to *B.* of the partnership assets (part of which consisted of a policy of which the partners were assignees), and *B.* was to covenant to pay the debts and indemnify *A.* against them. No further deed was executed. *A.* died, and *B.* afterwards assigned the policy to a purchaser who had notice of the deed. *A.*'s executors were afterwards compelled to pay partnership debts which ought to have been discharged by *B.* The policy being adversely claimed by the purchaser and by *A.*'s executors,

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PERISHABLE PROPERTY.

See TENANT FOR LIFE, 1, 3.

PERPETUATING TESTIMONY.

See EVIDENCE, 3.

PLEA.

1. The Plaintiff described himself as of "*Gray's Inn, Barrister at Law, and of No. 2, Cloisters, Middle Temple.*" The Defendant pleaded, that the description was false, and that the Plaintiff was not resident at No. 2, *Cloisters, Middle Temple.* Held, that the plea was bad in form, not negating a residence at *Gray's Inn.* *Bainbrigg v. Orton.* Page 28
2. But, *quære*, whether, even if correct in form, such a plea could be supported. *Ibid.*

PLEADING.

See BREACH OF TRUST, 4.

DEMURRER.

MORTGAGE, 2.

PLEA.

SUPPLEMENT.

TAXATION, 3.

TRUSTEE, 4.

WRONG-DOER.

POLICY OF ASSURANCE.

1. A tradesman insured the life of his debtor in his own name; he charged the debtor with the premiums, but they were never paid by him. On the death of the debtor, the Court held, that his representatives were entitled to the produce of the policy after

payment of the debt and premiums. *Morland v. Isaac.*

Page 389

2. There is a distinction between a policy effected to secure a debt and one to secure an annuity. *Ibid.*

See ORDER AND DISPOSITION, 1.

PARTNERSHIP, 1.

POWER.

1. Trustees were empowered, with the consent of the wife, to lend the trust monies to the husband. The wife authorized an immediate loan of part, and of the remainder at such times as the husband might require, and the husband covenanted to pay it in six months. The money was not called in, and was lost by the insolvency of the husband. Held, first, that the wife's consent could not be given prospectively; and, secondly, that the trustees were not bound to call in the money at the end of six months. *Child v. Child.* 50
2. A testator empowered his trustees to lend such part of the trust moneys as they should think proper to *A.* and *B.*, who were respectively his son and son in law. Held, that this authorized a several loan to either. *Parker v. Blozam.* 295
3. Three executors were authorized to lend trust monies to *A.* One of the executors (*C.*) employed part of the trust monies in his business. In 1812 *A.* and *C.* entered into partnership, when *A.* took upon himself the debt and gave security for the money to the



trust funds in trade; but the Court held, that the transaction amounted to a loan to *A.* under the power, and dismissed the bill with costs. *Parker v. Blozam.*

Page 295

4. Where there is an absolute appointment to *A.*, (an object of the power,) followed by a qualification limiting the interest of *A.* to a life interest, with remainder to persons not objects of the power, the latter being void, *A.* takes absolutely under the prior appointment. *Gerrard v. Butler.* 541

5. A testatrix, having a power to appoint a fund to her children, appointed it in this form :—Amongst my children, *A.*, *B.*, *C.* and *D.*, the share of *A.* to be upon the trusts of her marriage settlement, and to be paid to the trustees thereof. *A.* was the only person in the marriage settlement within the power. Held, that she took her share absolutely. *Ibid.*

See ABSOLUTE INTEREST, 3.
BREACH OF TRUST, 1.

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sale of the Plaintiffs' goods for which he had not given credit; he had also made profits by selling his own spirits mixed with those of his principals, and he had destroyed books of account pending the litigation. The Court disallowed him, in taking the accounts, 7,000*l.*, the amount of commission, which, by the contract, he would have been entitled to if his conduct had been proper. *Gray v. Haig, Haig v. Gray.* Page 219

3. A charge made by an agent for the sale of goods against his principal for an allowance in respect of warehouseman's salary disallowed, no such claim having been made in the accounts for fourteen years. *Ibid.*
4. The Court deals severely with any irregularities on the part of an agent, and requires him to act strictly in all matters relating to such agency, for the benefit of his principal. *Ibid.*
5. It is imperative upon an agent to preserve correct accounts of all his dealings and transactions; and the loss, and still more, the destruction of such evidence by the agent, falls most heavily upon himself. *Ibid.*
6. An agent is bound to act in the best manner he can for his principal, and in matters which are left to an agent's discretion, he can only act for the benefit of his principal. *Pariente v. Lubbock.* 588
7. A foreign merchant directed his correspondent in *England* to treat any consignment as his son's (who was in *England* and superintended

the sales and purchases), and to acknowledge him owner of the money, so that he might dispose thereof as if it was his own money. By the direction of the son, moneys in the hands of the correspondent, belonging to the father, were applied by him in paying a private debt of the son to the correspondent. Held (overruling the decision of the Master), that the transaction was valid. *Pariente v. Lubbock.* Page 588

PRIORITY.

See JUDGMENT.

MORTGAGE, 1.

NOTICE, 3.

TOLLS, 1.

PRIVILEGE.

See PRODUCTION.

PRODUCTION.

1. Cases and opinions of Counsel taken by trustees, as such merely, are not entitled to protection in a suit by the *cestuis que trust* against the trustees or their representatives. *Devaynes v. Robinson.* 42
2. The same rule applies to cases and opinions taken before the time when the Defendant (the representative of a trustee) admits having first heard of the questions raised by the bill. *Ibid.*

See LIEN, 4.

TITLE DEEDS.

PUBLIC COMPANY.

See CALLS.

DISCRETION.

FORFEITURE, 1.

PURCHASER FOR VALUABLE CONSIDERATION.

See JUDGMENT, 2.

LUNACY.

RAILWAY.

See DISCRETION.

FORFEITURE, 1.

REAL AND PERSONAL ESTATE.

1. The testator gave "all estate, effects and property, whatsoever and wheresoever," which he was or might be possessed of or entitled to "to his three executors, their executors and administrators," upon trust to stand possessed thereof, and the proceeds thereof, upon certain trusts for children and grandchildren. Held, that this, by itself, would pass real estate, but, upon the subsequent expressions, and the general scope and object of the will, the contrary was held. *Coard v. Holderness*.

Page 147

2. The Court, in this case, principally relied on the absence of the words "heirs," "devise" and "rent," and the use of the expressions "possession," "executors and administrators," "principal," the "balance," "the principal of the said legacies," the direction to claim a share from "his personal representatives," and the power to appoint new trustees, applicable to "executors" and not to "heirs." *Ibid*.

3. *A. B.* purchased an estate in consideration of an annuity. It was thereupon charged upon the purchased and also on another estate, and *A. B.* covenanted to pay it. On *A. B.*'s death, Held, that his personal estate was the primary fund for payment of the annuity.

Yonge v. Furze. Page 360

4. A testator "gave" to his wife, for her use and benefit, "his leases, monies, goods, furniture, plate, book debts, securities for money and all other property, of every description, that he might be possessed of." Held, that the real estate passed. *Re the Greenwich Hospital Improvement Act*. 458

See CONVERSION.

EXONERATION.

PARTNERSHIP, 2.

RECEIVER.

The Court will not permit its Receiver to be interfered with or dispossessed of the property, nor will it allow payment to him to be intercepted although the order appointing him may be perfectly erroneous. An application must first be made to the Court for leave. *Ames v. Trustees of Birkenhead Docks*. 332

REGISTRATION.

See JUDGMENT.

RELEASE.

The Court looks with considerable jealousy at a release executed by a young lady at or shortly after attaining twenty-one upon a settle-

ment of accounts between her and her trustees. *Parker v. Bloxam*.

Page 295

REMOTENESS.

Limitations of a term to trustees, upon trust to raise portions for the children of *A.* surviving *A.* and *B.*, "to vest in and to be paid and payable to" them at their ages of twenty-four years, with maintenance, &c. in meanwhile out of the expectant or presumptive shares, and a gift over on the death of all before their shares should become vested. Held, void for remoteness. *In re Blakemore's Settlement*.

214

See ABSOLUTE INTEREST, 3.

RENT-CHARGE.

A rent-charge was secured on a house, with power, when in arrear, to enter and receive the rents until all arrears and all costs, charges and expenses occasioned by non-payment should be satisfied. The rent-charge being in arrear, the grantee entered, and the house being greatly dilapidated and untenanted, he repaired and let it. Held, that the question, whether the grantee of a rent-charge entitled to be allowed monies expended by him in repairing the property was one to be determined at law, and that if he was not entitled thereto at law neither was he in equity. *Hooper v. Cooke*.

639

RESIDUE.

1. A testator devised an estate, *E.*,

to *A. B.* absolutely, and "all her freeholds, &c. not hereinbefore devised" to *A. B.* for life, with remainders over. *A. B.* died in the testatrix's life. Held, that the estate, *E.*, passed under the residuary devise. *Green v. Dunn*.

Page 6

2. A testatrix having two leaseholds, at *X.* and *Y.*, bequeathed those at *X.* to one for life, and directed, that after her decease, they should "form the residue of her leasehold estates thereafter bequeathed." She then bequeathed all the residue of her leaseholds, "whatsoever and wheresoever," not thereinbefore otherwise disposed of. Held, that the leaseholds at *Y.* also passed under the residuary gift. *Markham v. Ivatt*.

579

See REAL AND PERSONAL ESTATE.

REVERSIONARY INTEREST.

See FINES AND RECOVERIES ABOLITION ACT, 1.

REVIVOR.

Pending an account directed by the decree the accounting party died. An order was made, on motion to revive, against his executor, and that he might either admit assets or account for his testator's estate. *Cartwright v. Shepherd*.

122

See ABATEMENT, 1.

INJUNCTION, 2.

RIGHT OF PRE-EMPTION.

A testator gave to his son the option

exceeded that by one-third. Held, that the trustees having fixed what they considered "a fair and reasonable value," having authority to do so, it was incumbent on the Plaintiff to shew that it was fraudulent, in order to prevent the son's purchasing at 1,500*l.* *Edmonds v. Millett.* Page 54

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SATISFACTION.

"After payment of his debts" the testator gave certain legacies, one of 150*l.* to *E. B.*, and he directed his executors to pay "my bequests only to the individuals herein named." The testator owed *E. B.* 150*l.* Held, that the legacy was not a satisfaction of the debt, but that *E. B.* was entitled to both. *Jefferies v. Michell.* 15

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SECURITY FOR COSTS.

A Plaintiff described himself as resident within the jurisdiction. By amendment he described himself as of the ship *W.* "now on a

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work performed by each. *Robinson v. Anderson.* Page 98

2. Where the contrary is alleged, the burden of proof is on him alleging it. *Ibid.*

SOLICITOR AND CLIENT.

1. The Plaintiff, a solicitor, obtained from his client securities on his real estate, whilst he wilfully obstructed the Defendant (the former solicitor) in obtaining a final order for payment of his taxed costs, which would have enabled him to obtain a charge under the 1 & 2 Vict. c. 110. The Court held, that the Plaintiff was nevertheless entitled to the benefit of his securities. *Shaw v. Neale.* 157
2. On payment of a solicitor's bill, the client is entitled to the possession of letters written to the solicitor by third parties, but not to copies of letters written by the solicitor to third parties, unless they are paid for by the client. *In re Thomson.* 545
3. *Semble*, that a solicitor is entitled to retain the original letters written to him by his client. *Ibid.*

See COSTS, 1, 5.

DELAY, 1.

LIEN, 4.

SUBSTITUTED SERVICE.

TAXATION.

SPECIAL CASE.

The affidavit in support of an application for an order to appoint a guardian to concur, on behalf of an infant, in a special case under *Sir G. Turner's Act*, ought to be

intituled "In the matter of the act" and "In the matter of the infant," and not "In the special case." *Star v. Newbery.* Page 14

SPECIFIC LEGACY.

1. Distinction between the cases in which specific legatees of shares take *cum onere*, and those in which the general personal estate of the testator is liable to pay the future calls for the benefit of the legatees. *Armstrong v. Burnet.* 424
2. Where the interest of the testator in the subject-matter which he professes to bequeath is complete, or where it is so treated and considered by him and by all persons connected with it, the future calls fall on the legatees and not on the general personal estate. But where further payments are required to make perfect the interest which the testator professes specifically to bequeath, then the general personal estate is applicable for that purpose. *Ibid.*
3. A banking company was established in 1836. By the deed of settlement 5*l.* per share was payable immediately, and the Directors were empowered, at any time, to make a further call of 5*l.*, and on non-payment the shares might be forfeited. The shares were transferable, and, on transfer, the former proprietor was released. Legatees and executors might sell, but were not to be members until a transfer to them, and until then, were not entitled to the current dividends. The shareholders thereby cove-

further call of 5l. per share was made. Held, that it was payable by the legatees and not out of the testator's residuary estate. *Armstrong v. Burnet.* Page 424
See CALLS.

3 & 4

3 & 4

SPOLIATION.

1 & 2

When an accounting party destroys the accounts before the matters have been finally adjusted and still more pending a litigation, the Court will presume everything most unfavourable to him, consistent with the established facts. *Gray v. Haig.* 219
See ACCOUNT.

8 & 9

15 & 1

15 & 1

ANSWER.

PRINCIPAL AND AGENT, 1, 2, 4, 5.

STATUTE.

The general words of a statute are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be put upon those words consistently with the intention of preserving the existing policy untouched ; but

STATUTE.

When a dictio again withi Statu thoug nor a

and testify at the hearing will not be issued except to the extent of the old practice. *Hope v. Liddell*.
Page 438

SUBSTITUTED SERVICE.

Personal service on a solicitor of proceedings under a taxation dispensed with, and service by placing under his door substituted. *Re Templeman*. 574

SUBSTITUTIONAL GIFTS.

See ANNUITY, 1.

SUPPLEMENT.

A decree was made in the absence of an infant who was interested; nothing having as yet been done under it, and it appearing to be for her benefit, the Court made a supplemental order, under the 15 & 16 *Vict.* c. 86, s. 52, to carry on the decree. *Jebb v. Tugwell*.
461

TACKING.

Since the 3 & 4 *Will.* 4, c. 104, a mortgagee of copyholds may tack a simple contract debt to his mortgage debt, as against the customary heir or devisee, but not as against specialty creditors. It seems also that a mortgagee may tack a simple contract debt to his mortgage debt as against the heir, devisee or executor, wherever the equity of redemption is assets in their hands for payment of simple contract debts. *Rolfe v. Chester*. 610
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TAXATION.

1. *A.*, the next friend of infants in a suit, employed *B.* as solicitor therein and in other matters. An order was made, in the suit, for the taxation and payment to *B.* of his costs of suit. Before this had been done, *A.* obtained, *ex parte*, an order to tax *B.*'s bill in all the matters in which he had been employed for *A.* Held, that the order was regular. *In re Fluker*.
Page 143

2. By error and mistake, some items were omitted from, and others undercharged and overcharged in, a bill of costs referred for taxation. On a petition by the executor of the solicitor, liberty was given to insert the omitted items and increase those undercharged, but he was not allowed to decrease the overcharges. The costs of the application were ordered to be paid by the Petitioner. *Re Whalley*.
576

3. Pending a taxation, both the solicitor and client died, the reference was revived, and the taxation continued between the representatives. *Ibid.*
See Costs, 5.

TENANCY IN COMMON.

See JOINT TENANTS.

TENANT FOR LIFE.

1. A testator gave "all his property, both real and personal," to his wife for life, and he authorized her, with the consent of his executors, to sell or exchange "any part of his pro-



Birkenhead Docks held to have a priority over judgment creditors of the concern. *Ames v. Trustees of the Birkenhead Docks*.

Page 332

2. In a suit by mortgagees of a dock against the trustees and a judgment creditor, the chairman was appointed receiver of the tolls, with direction to pay into Court the balance, after paying the expenses of carrying on the concern and the interest on the mortgages. A judgment creditor having afterwards proceeded to attach the tolls under "The Common Law Procedure Act," was restrained by injunction. *Ibid.*
3. It was insisted, that the possession of the receiver was either that of the dock company or of the mortgagees, and that in the former case the judgment creditor ought not to be restrained in the exercise of his legal remedies against the company, and in the second, that the mortgagees had no power, under the acts of parliament, to carry on the concern, but this argument was held unavailing. *Ibid.*

TRACING TRUST MONEY.

1. The produce of a specific legacy misapplied by *A.*, an administrator, being traced into *post obit* securities given by *B.* to *C.*, the Court held that the *cestui que trust* was entitled to a charge on the securities. *Harford v. Lloyd*. 310
2. A specific legacy of 6,000*l.* Consols, bequeathed to the Plaintiffs, was unnecessarily and im-

properly sold out by the administrator (*A.*), with the aid of *B.*, and the produce carried partly to the banking account of *A.*, and the remainder to that of *B.* A series of shuffling of cheques and transfer of moneys took place, but 2,908*l.* was traced to *B.* About this time *B.* laid out monies in the purchase of a *post obit* security, and though the trust monies could not be distinctly traced into the securities, yet the Court held, from the suspicious character of the transactions, that such was the just inference, so far as to throw on the other side the *onus* of disproving it, and this not having been done, the Court held, that the Plaintiffs had a charge on the securities for the 2,908*l.* and interest. *Harford v. Lloyd*. Page 310

TRANSFER.

See Escrow.

TROVER.

In a suit to recover specific chattels, it is not necessary, as in *trover*, to prove a conversion. *Turner v. Letts*. 185

TRUSTEE.

1. A trustee cannot, from mere caprice, retire from the performance of his trust, without paying the costs occasioned. But circumstances arising in the administration of a trust which have altered the nature of his duties, justify him in leaving it and entitle him



was allowed his costs. *Ibid.*

3. A trustee desirous of retiring, by reason of his want of confidence in his co-trustee, cannot safely effect his object by getting such co-trustee to appoint a new trustee in his place under a power vested in him for that purpose. *Ibid.*

4. There is no such general rule, that a wrong-doer cannot file a bill. Thereupon, if *A.* and *B.*, two trustees, have committed a breach of trust, and are equally liable, but *B.* received the produce, *A.* may sustain a bill against *B.* alone to recover the amount, for the benefit of the trust. *Baynard v. Woolley, Wearing v. Baynard.* 583

See BREACH OF TRUST, 2, 3, 4.

COSTS, 5.

DISCRETION.

ESCROW.

EXECUTOR.

MORTMAIN, 1.

PRODUCTION.

RELEASE.

RIGHT OF PRE-EMPTION.

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3. A purchaser, who had altogether denied the vendor's right to a specific performance, ordered to pay the costs of suit instituted by the vendor for that purpose down to the hearing, although the title was not finally completed until after the decree. *Carrodus v. Sharp*.

Page 56

VESTED INTEREST.

A testator gave a legacy to trustees for the maintenance of *A.* and *B.* during their minority, "and when and so soon as the youngest child should have been born twenty-one years," to "pay and divide" it between them, if they should then both be living. But if either of them should be then dead, then he gave his moiety over to other persons. They both died before the youngest would, if living, have attained twenty-one, but *A.*, the eldest, had attained that age. Held, that *A.* took a vested interest, and that his representatives were entitled to a moiety. *In re Smith's Will*. 197

See ABSOLUTE INTEREST, 2.

VOLUNTARY SETTLEMENT.

See SETTLED ACCOUNT.

VOUCHERS.

See PRINCIPAL AND AGENT, 1, 2, 4, 5.

SPOILIATION.

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WARD.

Disinclination of the Court to sanction the marriage of an infant ward, where it is impossible for him, by reason of his infancy, to settle his real estate so as to go along with his title and to make provision for younger children. *Honywood v. Honywood*. Page 451

WILL.

See ABSOLUTE INTEREST.

ACCOUNT.

ANNUITY, 2, 4, 5, 6.

CALLS.

ELECTION.

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INCONSISTENCY.

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ISSUE.

JOINT TENANTS.

LAPSE OF TIME.

LEGATEE.

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NEXT OF KIN.

NEXT PRESENTATION.

REAL AND PERSONAL ESTATE,
1, 2.

REAL ESTATE.

REMOTENESS, 1.

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WRONG-DOER.

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B. received the produce, *A.* sustain a bill against *B.* also recover the amount for the benefit of the trust. *Baynard v. Weaving v. Baynard.* Page See ACCOUNT.

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